82-203
No.

Office - Supreme Court, U.S.
FILED
AUG 2 1982
ALEXANDER L. STEVAS,
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In The

Supreme Court of the United States

October Term, 1982

MARK S. SAVOY and ROBERT J. TARR,
Petitioners,

vs.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED

Whether the petitioners' Fifth and Fourteenth Amendment rights not to be placed twice in jeopardy will be violated by their trial on charges to which they have already pled guilty, been sentenced, and commenced execution of said sentences.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in 386 Mass. 260, 435 N.E.2d 330 (1982). (A copy of said opinion is appended hereto as Appendix A.) The related opinion of the District Court below was not reported. (A copy of said opinion is appended hereto as Appendix B.)

JURISDICTION

The judgment of the state court (Appendix A) was entered on May 13, 1982. Rehearing was sought on May 25, 1982, and on June 3,

1982, the Supreme Judicial Court of Massachusetts denied the petition for rehearing. (Copies of the petition for rehearing and of the denial of said petition are appended hereto as Appendices C and D respectively.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3), as the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid

or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection of rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. The statutes under which Petitioners were prosecuted, though nothing turns on their terms, are M.G.L. c.265, §§13A and 22, and M.G.L. c.266, §127, and are appended hereto as Appendix E.

4. Massachusetts Rule of Criminal Procedure 29(a), which the state court relied upon in determining that the petitioners' sentences could be increased *sua sponte* by the trial judge, provides as follows:

The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or hav-

> ing the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done.

The predecessor statute to Massachusetts Rule of Criminal Procedure 29(a), M.G.L. c.278, §29C, repealed by St. 1979, c.344, §48, provides:

> If it appears to the superior court that justice has not been done or cannot be done, it may within sixty days after a sentence has been imposed, upon such terms and conditions as it shall order, revise or revoke any sentence imposed: if such sentence was imposed without trial after a plea of guilty or nolo contendere the court may in the event of such revocation permit the withdrawal of the plea upon which the sentence was imposed.

STATEMENT OF THE CASE

On August 5, 1980, the petitioners were indicted by a Grand Jury sitting in Norfolk County, Commonwealth of Massachusetts, on charges of rape, unnatural rape, malicious destruction of personal property and assault and battery. On October 5, 1981, in the Superior Court Department, Norfolk County, Commonwealth of Massachusetts, petitioners Savoy and Tarr, along with co-defendants Richard Dovel, John Strickland and Alexander Aldoupolis, pleaded guilty to charges of rape, unnatural rape and malicious destruction of property. Abrams, J. accepted their guilty pleas and sentenced them to suspended sentences of from three to five years at the Massachusetts Correctional Institution (hereafter M.C.I.) at Walpole; two years probation; and imposed court costs of Five Hundred Dollars ($500.00), to be paid at the rate of five dollars ($5.00) per week.

Petitioners Savoy and Tarr began serving their sentences by signing a probation contract, commencing probation, and beginning payment of the imposed court costs prior to October 9, 1981. Each petitioner has continued to pay the court costs up to the present date.

On October 8, 1981, the then counsel for each petitioner was notified to appear in court the following day, but was given no reason for such required presence.

On October 9, 1981, Abrams, J., claiming to be acting pursuant to Massachusetts Rule of Criminal Procedure 29, revoked the suspension of the sentences and ordered each defendant to stand committed at M.C.I. Walpole, if they did not elect to withdraw their guilty pleas by October 13, 1981. (A copy of the transcript of the October 9, 1981 proceedings is appended hereto as Appendix F.)

Petitioners obtained a stay of the Superior Court proceedings on October 9, 1981, from a single justice of the Supreme Judicial Court. (A copy of the order staying proceedings is appended hereto as Appendix G.) Ultimately, the matter was reserved and reported to the full court by the single justice. (A copy of said reservation and report is appended hereto as Appendix H.)

On May 13, 1982, the Supreme Judicial Court, in *Aldoupolis v. Commonwealth*, 386 Mass. 260, 435 N.E. 2d 330 (1982), held (1) that the original suspended sentences *were* legally imposed; (2) that a trial judge does have the power to revise and revoke sentences on his own power so as to increase their severity and that such resentencing does not violate the constitutional prohibition against double jeopardy; and (3) that the defendants did not receive proper notice and an opportunity to be heard on the issue of a revision and revocation of their sentences, thus rendering the trial judge's resentencing invalid. The court ruled that the judge had the power to vacate the original sentences and impose new ones and directed the Superior Court to resentence the defendants even though it had declared the original suspended sentences valid. (See Appendix A.)

On May 25, 1982, the petitioners petitioned the Supreme Judicial Court for a rehearing, requesting that the remand for "resentencing" be revised to a remand "for action consistent with this Court's opinion." The petitioners also requested reconsideration of the double jeopardy claim. (*See* Appendix C.) The court denied the Petition for Rehearing on June 3, 1982. (See Appendix D.)

On June 25, 1982, a Superior Court judge ordered the petitioners to appear for resentencing at 10:00 a.m. on July 1, 1982.

On Monday, June 25, 1982, petitioner Savoy filed a complaint under 42 U.S.C. § 1983 in the United States District Court for Massachusetts, requesting that the resentencing scheduled for July 1, 1982, be enjoined. On June 30, 1982, the United States District Judge Robert E. Keeton denied petitioner Savoy's request for an injunction and for a stay of proceedings pending appeal on the same day. (A copy of the denial of petitioner's request for injunctive relief is appended hereto as Appendix I.)

On the same day, June 30, 1982, the Circuit Court of Appeals denied petitioner Savoy's appeal from District Judge Robert E. Keeton's order. (A copy of the denial of the appeal is appended hereto as Appendix J.)

Immediately thereafter, on June 30, 1982, petitioners' co-defendant, Alexander Aldoupolis, applied to this Court for a stay of the order of the Supreme Judicial Court of Massachusetts. On July 1, 1982, the Honorable William J. Brennan, Jr., Associate Justice of the United States and Circuit Justice for the First Circuit, granted Aldoupolis' application for stay until July 8, 1982.

On July 1, 1982, pursuant to the aforesaid stay issued by Mr. Justice Brennan, the Norfolk County Superior Court for the Commonwealth of Massachusetts, per Roger J. Donahue, J., Associate Justice of the Superior Court, ordered that petitioners' resentencing be stayed until July 15, 1982.

On or about July 6, 1982, petitioners applied to this Court for a stay of execution of their resentencing per order of the Supreme Judicial Court of Massachusetts, and sought to consolidate their application with the application filed by their co-defendant, Alexander Aldoupolis, in this Court on June 30, 1982.

On July 6, 1982, the Honorable Mr. Justice Brennan denied petitioners' aforesaid application without prejudice, and vacated the stay which had been granted relative to the petitioners' co-defendant, Aldoupolis, also without prejudice. (See Application for Stay of the Order of the Supreme Judicial Court of Massachusetts, No. A-1140.)

On July 12, 1982, petitioners filed a petition with a single justice of the Supreme Judicial Court of Massachusetts, wherein they requested that the petitioners be allowed to withdraw their guilty pleas in this matter in the Superior Court Department of the Trial Court, Norfolk Division. Petitioners preserved their rights to pursue their double jeopardy claims but moved to withdraw their guilty pleas to avoid the illegal resentencing procedure and further punishment. (A copy of said petition for relief is appended hereto as Appendix K.) Said petition was denied without an opinion on or about July 14, 1982.

When petitioners appeared for resentencing in the Superior Court Department, Norfolk Division, on July 15, 1982, they filed motions to withdraw their guilty pleas, claiming that, if they were to be forced to undergo an unconstitutional resentencing proceeding, they should be allowed to withdraw their guilty pleas as per Justice Abrams' offer on October 9, 1981. Petitioners expressly reserved their rights to challenge the resentencing proceeding and any prospective trial on double jeopardy grounds in revised motions, and reiterated that the withdrawal of their pleas was requested only to avoid the substantial probability of immediate incarceration if they failed to do so. (A copy of each petitioner's Motion to Withdraw his Guilty Plea is appended hereto as Appendix L & La.)

REASONS FOR GRANTING THE WRIT

This case entails serious double jeopardy concerns. It is universally agreed that, when no trial occurs in a criminal proceeding because the defendant pleads guilty, jeopardy attaches upon the court's acceptance of the guilty plea. *United States v. Jerry*, 487 F.2d 600,606 (3rd Cir. 1973); *Anno: Plea of Guilty as Basis of Claim of Double Jeopardy in Attempted Subsequent Prosecutions for the Same Offense*, 75 A.L.R.2d 683 (1961).

Once the court accepts the guilty plea, therefore, "principles of fairness and finality require that [the defendant] not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson*, 420 U.S. 333, 343 (1975); see also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

That jeopardy had attached here, when petitioners pleaded guilty on October 5, 1981, the court accepted those pleas and valid sentences were imposed upon petitioners, is beyond question. Petitioners have already served many months of their legally imposed sentences, and have been forced to endure the obloquy that accompanied the extensive publicity of their case.

The state court, in ordering that petitioners be resentenced, has thus violated the very essence of the double jeopardy clause, in that its order subjected the petitioners to the specific dangers the clause was designed to prevent—"the possibility of further punishment". *United States v. Wilson, supra* at 343. What is most indefensible about the order, is that it was made, despite the fact that the court recognized the validity of the original sentences that were imposed. There has yet to be a decision rendered by this Court, or by any state or lower federal court, that has sanctioned resentencing in light of such obvious double jeopardy dangers.

The Massachusetts Supreme Court, however, determined that, in light of this Court's holding in *United States v. DiFrancesco*, 449 U.S. 117 (1980), Rule 29 of the Massachusetts Rules of Criminal Procedure offered the petitioners sufficient notice that their sentences could be increased *sua sponte* by the trial judge within sixty days after imposition to avoid double jeopardy implications. *Aldoupolis v. Commonwealth*, 386 Mass. 260, 274, 435 N.E.2d 330, 338 (1982).

According to the state court, *DiFrancesco, supra*, was "dispositive of the double jeopardy claims of the defendants." *Id.*, 386 Mass. at 274-75, 435 N.E.2d at 338. "The conditional notice of a sentence under the sixty day period for revision or revocation pursuant to Rule 29" was viewed as "analogous" to the appeal provisions of 18 U.S.C. §3576 (1970) [dangerous special offender statute] in that the federal statute did not render a sentence final until after disposition of the government's appeal or until the time for appeal had lapsed. *Id.*

The state court was wrong in equating Rule 29 with 18 U.S.C. §3576: that latter statute contains specific language permitting the government to appeal a defendant's sentence, whereas Rule 29 simply tracks, with minor alterations, the language of its predecessor, M.G.L. c.278, §29C, which heretofore had never been interpreted to allow the trial judge's actions in this case. Hence the petitioners were given insufficient, and arguably, no warning that their sentences could be increased, and their legitimate expectation of finality in their sentences is protected under the double jeopardy clause.

DiFrancesco did not, of course, extinguish the double jeopardy clause's application to the sentencing phase of a criminal proceeding. In a five to four decision this Court held narrowly that a statute could provide for review of a defendant's sentence initiated by the prosecution where the statute properly warned the defendant that such review was possible. *United States v. DiFrancesco, supra* at 136.

This Court emphasized throughout the decision that the defendant was at all times aware that "a dangerous special offender statute

is subject to increase on appeal." *Id.* The defendant was "charged with knowledge of the statute and its appeal provisions" and thus "ha[d] no expectation of finality in his sentence." *Id.*

Hence, this Court did not overturn prior precedent barring an increase in sentence by the trial court after service of the sentence has begun; it simply confined such precedent to the specific context in which the defendant did not have sufficient notice of the possibility of a revision of his sentence, and thus would anticipate that his original sentence would be his final one.

Any doubts that the double jeopardy clause has remaining vitality in the sentencing process have been laid to rest in *Bullington v. Missouri*, 451 U.S. 430 (1981). In *Bullington*, the defendant was convicted of capital murder and the jury sentenced him to life imprisonment rather than to death pursuant to the applicable Missouri procedure. The defendant subsequently had his conviction reversed. The state then announced that it would again seek the death penalty. This Court held that subjecting the defendant to another sentencing proceeding would violate his rights under the double jeopardy clause. *Id.* at 446-47.

Other post-*DiFrancesco* courts have similarly applied the double jeopardy clause to the sentencing stage. In *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), for example, the defendant claimed that the prosecution's failure to adduce sufficient proof of two prior felony convictions in a sentence enhancement proceeding barred his resentencing upon remand. *Id.*, at 1349. The Texas Court of Criminal Appeals had determined that the state had not proven the existence of *Bullard's* two prior felonies. *Id.* Such proof was necessary to enhance the defendant's punishment on his third conviction. *Id.*, at 1358. When the Texas appellate court remanded for a new sentencing hearing, however, thereby allowing the prosecution a second bite of the apple at proving the prior offenses, *Bullard* petitioned for habeas corpus relief. The Fifth Circuit granted the petition finding that the

resentencing violated *Bullard's* double jeopardy rights. *Id.*, at 1362. See also *Myers v. State*, 48 Md.App. 420, 427 A.2d 1061 (1981).

Every court which has been faced with attempts to resentence a criminal defendant subsequent to this Court's opinion in *DiFrancesco* has either read that case narrowly upon its own facts, or only applied it to situations where the original sentence was illegal.

In *United States v. DeLeo*, 644 F.2d 300 (3d Cir. 1981), the defendant moved pursuant to Fed.R.Crim.P.35 to correct his sentence, where an order of restitution exceeded the actual amount of damages. The judge, instead of reducing the amount of restitution, substituted a fine in the original amount of restitution. The Court of Appeals reversed, stating that "[T]he principle of finality underlies the rule that a court may not substantively alter a judgment without specific authorization." *Id.* at 301.

Similarly, in *United States v. Williams*, 514 F.Supp. 334,335 (E.D.Pa. 1981), the defendant was sentenced to a term of imprisonment and of probation. He challenged the imposition of probation pursuant to 18 U.S.C. §3651 where the sentence of incarceration was not suspended. *Id.* The Court acknowledged that *DiFrancesco* raised the possibility that it could resentence the defendant altogether, but declined to do so, and vacated the sentence of probation. *Id.*, at 336.

Several Circuits have read *DiFrancesco* to permit resentencing on one charge where a second charge was found to be duplicitous of the first. In *United States v. Busic*, 639 F.2d 940 (3d Cir. 1981), the defendant's conviction for use of a firearm to commit a felony was vacated because it was duplicitous of the conviction for assault with a dangerous weapon. The sentencing judge had not given the defendant the maximum term on the assault charge because he had been able to enhance the punishment on the use of a firearm charge, which required that any sentence imposed run consecutive to other charges. The Court held that as the judge considered the charges interdepend-

ent for sentencing purposes, he should be able to resentence on the valid conviction to achieve his original purpose. *Id.* at 947. The Second Circuit in *McLain v. United States*, 676 F.2d 915,918 (2nd Cir. 1982), reached a similar conclusion, but was careful to point out that double jeopardy problems might arise where it was apparent the sentencing judge attempted to insure against invalidation of one sentence by imposing harsher punishment on the other.

Such cases are, of course, readily distinguishable from the present one. The petitioners here did not initiate an attack upon their convictions or sentences, nor were their sentences deemed invalid. Whereas in *Busic* and *McClain, supra*, the invalidity of one sentence so tainted the other that resentencing was called for; here the disposition had no flaws and double jeopardy considerations prevent resentencing.

Some state courts have refused to apply *DiFrancesco* where the statute in question is not absolutely clear on the issue of finality. In *Matter of Shriner*, 95 Wash.2d 541, 627 P.2d 99 (1981), the sentencing court imposed terms of imprisonment on two separate charges, but failed to specify whether they should run concurrently or consecutively. Three months later, the court concurred with the prosecutor's recommendation to the Board of Prison Terms and Paroles that the sentences be consecutive. The relevant state statute provided that sentences should be served concurrently unless otherwise specified. The court held that, where the original sentence was not illegally imposed, it could not be changed. *Id.*, at 101; *cf. State v. Pina*, ____Conn.____, 440 A.2d 962 (1981) (Court which failed to specify if defendant's sentences were concurrent or consecutive, could not resentence defendant ninety-eight days later to consecutive terms).

Thus *DiFrancesco* did not remove sentencing from the protections of the double jeopardy clause: it simply restricted the applicability of the clause to situations in which the defendant would have a

legitimate expectation of finality in his sentence. Such was the case here.

No Massachusetts precedent permitted an increase in a defendant's sentences once he had commenced execution of that sentence. Granted, no case had specifically outlawed such an increase on its own facts; however, every pronouncement from the Massachusetts Supreme Judicial Court adumbrated such a holding.

A fair summary of existing Massachusetts law in this area is furnished in the Reporters' Notes accompanying Rule 29. The Notes provide that, "The rule governs *reductions* of sentences motivated by demands of fairness." Mass.Ann.Laws, Criminal Procedure 474 (Lawyers Co-op.Pub.Co. 1979). (Emphasis added). *Quoting from District Attorney for the Northern District v. Superior Court*, 342 Mass. 119, 128, 172 N.E.2d 245, 250 (1961), the Notes point out that the Rule will allow review of a sentence where a "conscientious judge . . . feel[s] that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account. . . ." Mass. Ann. Laws, *supra*. The Reporters' Notes further allude to the common law view that a sentence may be increased if execution of that sentence has not begun; however, "[t]hat an increase in the sentences once execution has commenced is not permitted has . . . long been settled."[1] *Id*.

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[1]The common law tradition preventing resentencing once execution of sentence has begun adds support to petitioners' anticipation of finality in their sentences. That tradition may be found in most of the jurisdictions treating the subject matter. See *Anno: Power of trial court to change sentence after commitment or payment of fine*, 168 A.L.R. 706 (1947). A list of the states and representative cases therefrom adhering to this rule is appended hereto as Appendix M. That the vast majority of states, including Massachusetts, had deveoped such a longstanding rule, cuts broadly against the Supreme Judicial Court's asseertion that Rule 29 gave proper warning of such a drastic change in existing law.

The language from the Reporters' Notes thus clearly indicates that Rule 29 was designed to authorize a reduction in sentence imposed upon a defendant which the trial court believes is too severe; it does not authorize an increase in sentence once execution of the sentence has begun.

The Notes, however, only touch the surface of Massachusetts law regarding resentencing. From early times in Massachusetts, "the importance of the fact that a sentence has not been executed in whole or in part has been recognized in cases where the power of the court to amend or set aside and impose a new sentence has been involved." *District Attorney for the Northern District v. Superior Court, supra,* 342 Mass. at 125-26, 172 N.E.2d at 249, quoting *Fine v. Commonwealth,* 312 Mass. 252, 256, 44 N.E.2d 659 (1942). A sentence is a "final judgment in a criminal case, and that is the end of the case, apart from statutory provisions, so far as concerns the usual and ordinary control of the court. . . ." *Fine v. Commonwealth, supra,* 312 Mass. at 256, 44 N.E.2d at 662.

Although a court is not barred from reducing a sentence of imprisonment simply because a defendant has served a part of it, it is established in Massachusetts that, absent some special statutory authority, a trial court has no power to modify upward a defendant's sentence once execution of the sentence has commenced. *District Attorney for the Northern District v. Superior Court, supra,* 342 Mass. at 127-29, 172 N.E.2d at 249-50; *Commonwealth v. Foster,* 122 Mass. 317, 323, 23 Am. Rep. 326 (1877). This principle even extended to situations in which the sentence was illegal or erroneous.

In *Commonwealth v. Foster, supra,* for example, a defendant had been found guilty on several counts of an indictment, but was initially sentenced upon only two of the counts. The defendant was then imprisoned under the sentence. The district attorney, some three years later, moved for sentencing upon a third count, and the trial court passed sentence over the defendant's objection upon the third

count. The Supreme Judicial Court held that the defendant could not be sentenced upon this other count during a subsequent term to which the case had been continued, even if the first sentence on the two counts was erroneous. *Id.*, at 323. *See also Mark Sennot's Case*, 146 Mass. 489, 493, 16 N.E. 448, 451 (1888).

In *Commonwealth v. O'Brien*, 175 Mass. 37, 39-40, 35 N.E. 466, 467 (1899), the court held that the statutory power to stay sentence and thereafter, "to deal with the sentence whenever the exceptions are overruled . . . impliedly includes the power to correct any illegality or error in sentence, *provided it then remains wholly unexecuted*". (Emphasis added.)

Numerous other cases further establish the proposition that once the defendant commences execution of an erroneous sentence in excess of the court's jurisdiction, the sentence is not void but only voidable at the defendant's instance by bringing a writ of error. See *Gallinaro v. Commonwealth*, 362 Mass. 728, 736-737, 291 N.E.2d 420, 425 (1973); *Commonwealth v. Conroy*, 333 Mass. 751, 756-757, 133 N.E.2d 246, 249-250 (1956); *Commonwealth v. Morgan*, 280 Mass. 392, 394, 182 N.E. 926, 927 (1932); *Commonwealth v. Murphy*, 174 Mass. 369, 372, 54 N.E. 860, 861 (1899), aff'd, *Murphy v. Massachusetts*, 177 U.S. 155 (1900); *see also Hickman v. Fenton*, 120 Neb. 66, 231 N.W. 510 (1930). If a defendant elects to bring a writ of error to attack an allegedly erroneous sentence, his sentence may be increased on resentencing because he is "deemed to have waived any constitutional objections that he might have to another trial or to the entry of a proper judgment."[2] *Commonwealth v. Murphy, supra*, 174 Mass. at 371, 54 N.E. at 861. It is crystal clear, however, that it is the right an privilege of the defend-

[2]This statement is subject, of course, to the provisions in *North Carolina v. Pearce, supra*, 395 U.S. 711, requiring a trial judge to state the reasons on the record for any increase in sentence after a successful appeal.

ant, and the defendant alone, to bring the writ of error and reverse the sentence; and conversely, "the defendant might well waive the error and submit and perform the judgment and sentence without being subjected to another conviction and punishment for the same offense." *Commonwealth v. Loud*, 44 Mass. (3 Met.) 328, 329-30, 37 Am. Dec. 139 (1841); *See Commonwealth v. Murphy, supra.*

This long line of Massachusetts cases holds unequivocally that, once a criminal defendant has begun to serve the sentence imposed upon him, he may not be brought back into the same court and given a harsher punishment. This rule prevailed even where the sentence may have been illegal. Certainly under these circumstances no criminal defendant in Massachusetts could anticipate that Rule 29 would be interpreted to allow such an increase. Because these petitioners had no reason not to expect their sentences to be final, the double jeopardy clause forbids their revocation and increase.

Thus, the criteria relied upon by the state court (Appendix A), in ordering resentencing of petitioners runs counter to the most basic double jeopardy principles, and, its order must be set aside.

Any argument that petitioners have now waived the right to assert their former jeopardy claims, because they have withdrawn their guilty pleas, is untenable. The withdrawal was made under the Damoclean sword of the resentencing proceeding, and thus no waiver of petitioners' double jeopardy claims may be inferred.

Whether an accused has waived his federal rights is a matter of federal law, and an effective waiver of a Constitutional right requires "an intentional relinquishment of [such] known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The petitioners here never gave up their rights to pursue their double jeopardy claim, but rather have vigorously opposed their resentencing. In addition, they specifically preserved their privilege to pursue their constitutional claim when making the motions to withdraw their pleas. The fact that

petitioners have adequately protected their rights, coupled with the fact that this Court "indulge[s] every reasonable presumption against waiver of constitutional rights", strongly militates against a determination that these rights have been so waived. *Id.*

Moreover, waiver, in order to be valid, must not be the product of duress. *United States v. Jackson*, 390 U.S. 570 (1968). This Court has previously denounced procedures "that needlessly chill the exercise of constitutional rights" by either offering an incentive for waiving the fundamental right or by imposing harsher penalities for asserting that right. *Id.*, at 582-583. That is precisely, however, what occurred here.

The petitioners were presented with the "Hobson's choice" of either 1) withdrawing their guilty pleas and thereby avoiding the imminent prospect of incarceration, yet facing the obvious challenge by the government that by so doing they have waived their double jeopardy claims; or 2) letting their guilty pleas stand with the distinct probability that the new sentence would be an increase over the valid original sentence. This Court must "'require something more substantial than a Hobson's choice'" before these petitioners "can be said to have relinquished voluntarily" their constitutional rights. *United States v. Dinitz*, 424 U.S. 600, 608 (1976), *citing United States v. Dinitz*, 492 F.2d 53, 59 (1974).

Unlike in *Dinitz, supra*, this is not a case where the defendant maintains "control over the course to be followed in the event of [judicial or prosecutorial] error". *United States v. Dinitz*, 424 U.S. at 609. Nor is this a traditional case where the defendant withdraws his guilty plea due to his active desire to go to trial, or where the defendant's sentence has been vacated at his own insistence, thereby vitiating any double jeopardy implications. *See United States v. Tateo*, 377 U.S. 463 (1967). It is sufficient to say that this is a situation where as a result of the erroneous state court decision, the petitioners had no recourse but to submit to one of two procedures, either

of which subjected them to further jeopardy. *United States v. Wilson, supra*. Surely, they cannot be found to have relinquished such funamental rights simply for choosing the procedure that was, for all intents and purposes, the lesser of two evils. To the contrary, it is the petitioners' contention that *any* procedure or action taken by the state pursuant to the Supreme Judicial Court's decision, constitutes double jeopardy.

In sum, the Massachusetts Supreme Judicial Court has decided an important question of federal law which was left open in *DiFrancesco*. The state court has interpreted *DiFrancesco* such that, at least in Massachusetts, no criminal defendant's sentence may be considered final for a period of sixty days. Whatever the double jeopardy implications may be to future defendants from this decision, it is apparent that these petitioners were improperly stripped of their legitimate expectation of finality in their original sentences.

This Court should not extend its holding in *DiFrancesco* to encompass the present situation.

CONCLUSION

For the foregoing reasons, this Court should grant petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

P. J. PISCITELLI
J. RUSSELL HODGDON
Attorneys for Petitioners

APPENDIX A

ALEXANDER ALDOUPOLIS VS. COMMONWEALTH (AND FOUR COMPANION CASES[1]).

SUFFOLK, FEBRUARY 2, 1982. — MAY 13, 1982.

Present: HENNESSEY, C.J., WILKINS, LIACOS, NOLAN, & O'CONNOR, JJ.

Practice, Criminal, Sentence. *Rape. Constitutional Law,* Double jeopardy. *Statute,* Construction. *Rules of Criminal Procedure.*

The language of G. L. c. 279 § 1, prohibiting a judge from imposing a suspended sentence upon a defendant convicted of a crime "punishable by death or imprisonment for life" did not prohibit suspending the execution of sentences of imprisonment imposed upon defendants convicted of rape under a statute prescribing "imprisonment . . . for life or for any term of years." [ ] NOLAN, J., dissenting.

A judge, upon his own motion, had authority under Mass. R. Crim. P. 29 to revoke suspended sentences lawfully imposed upon criminal defendants following their pleas of guilty and to impose more severe sentences, notwithstanding the partial execution of the defendants' original sentences. [ ]

Revocation of suspended sentences lawfully imposed upon criminal defendants after pleas of guilty, and the imposition of new sentences to terms of imprisonment, did not violate the defendants' Federal constitutional guarantee against double jeopardy, where the facts presented no issue of multiple punishment of the defendants [ ], and where, in light of the judge's power to revise sen-

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[1]The companion cases are by Richard Dovel, Mark Savoy, John Strickland, and Robert J. Tarr against the Commonwealth.

tences during the sixty-day period provided by Mass. R. Crim. P. 29, the defendants could have had no expectation of finality in their original sentences [ ].

Revocation of suspended sentences lawfully imposed upon criminal defendants after pleas of guilty, and the imposition of new sentences to terms of imprisonment, did not violate the defendants' Federal constitutional guarantee against double jeopardy, where the facts presented no issue of multiple punishment of the defendants [ ], and where, in light of the judge's power to revise sentences during the sixty-day period provided by Mass. R. Crim. P. 29, the defendants could have had no expectation of finality in their original sentences [ ].

CIVIL ACTIONS commenced in the Supreme Judicial Court for the county of Suffolk on October 9, 1981, October 13, 1981, October 14, 1981, and October 19, 1981.

The cases were reported by *Lynch*, J.

Stephen Hrones for Alexander Aldoupolis.

Joseph R. Welch for Robert J. Tarr.

Marie T. Buckley for Richard Dovel.

William H. Pritchard for John Strickland.

P. J. Piscitelli (*J. Russell Hodgdon* with him) for Mark Savoy.

Charles J. Hely, Assistant District Attorney, for the Commonwealth.

Appendix A

Barbara A. H. Smith, Assistant Attorney General, for the Attorney General, intervener.

Anthony M. Traini, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

LIACOS, J. A grand jury indicted the defendants on August 5, 1980, for rape, unnatural rape, and malicious destruction of property. On October 5, 1981, each defendant pleaded guilty to the charges.[2] The judge accepted their pleas and sentenced each to a suspended sentence of from three to five years at the Massachusetts Correctional Institution, Walpole, two years' probation, and imposed court costs of $500.[3] Subsequently, the defendants reported to the probation officer, signed probation contracts, and made partial payments of the court costs.

On October 8, 1981, counsel for each defendant was notified to appear in court the following day. Less than twenty-four hours' notice was given of this hearing, and the purpose of the hearing was not disclosed. On October 9, 1981, the judge, acting under the authority of Mass. R. Crim. P. 29, 378 Mass. 899 (1979), revoked the suspension of the defendants' sentences and ordered the defendants to stand committed for the three-to-five year terms, with the provision that each could withdraw his guilty pleas on or before October 13, 1981, and stand trial in February, 1982. The judge revoked the suspension of the execution of the sentences (1) noting the "public interest in the

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[2]The defendants were also indicted for assault and battery. Each such indictment was placed on file without a change of plea. The defendant Aldoupolis was indicted for kidnapping, which indictment was dismissed.

[3]See G. L. c. 280, § 6. Court costs were to be paid at the rate of $5 a week over the two-year probationary term.

sentences" previously imposed; (2) questioning the legality, in light of G. L. c. 279, §§ 1 and 1A, of a suspended sentence for the crime of rape charged under G. L. c. 265, § 22; and (3) "[i]n view of the statements of the District Attorney objecting to my imposing a suspended sentence, as well as a desire to have this case tried on its merits." None of the defendants was afforded an opportunity to argue, respond, or object to the proceedings.[4]

On the same day, the defendant Aldoupolis moved before a single justice of this court to enjoin further proceedings in the Superior Court until the close of business on October 14, 1981.[5] The single justice issued the requested stay, heard oral arguments on October 14, and continued the matter to October 20, 1981. Before that day, all the defendants filed petitions for relief under G. L. c. 211, § 3. The single justice reserved and reported the matter to the full court.[6]

The defendants raise three issues: (1) whether G. L. c. 279, § 1, prohibits the suspension of the execution of a sentence of imprisonment for an offense punishable by life imprisonment or for any lesser term of years; (2) whether the trial judge was authorized under Mass. R. Crim. P. 29 to convert the suspended sentence to a sentence of imprisonment without violating the double jeopardy clause of the United States Constitution; and (3) whether, if the answer to issue (2)

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[4]The defendants Aldoupolis and Dovel subsequently filed written motions to record their objections.

[5]Prior to a hearing on this motion the defendants Dovel, Tarr, and Savoy filed motions to intervene. The defendant Strickland filed a petition for relief under G. L. c. 211, § 3. The single justice also allowed the Attorney General to intervene on behalf of the Commonwealth.

[6]In addition to the briefs of the parties, we acknowledge the assistance of an amicus brief filed by the Massachusetts Association of Criminal Defense Lawyers.

is in the affirmative, the judge can take the action described on less than twenty-four hours' notice to the defendants, without any prior notification of the purpose the hearing, and without the defendants' having an opportunity to be heard at the hearing.

Because the issues before the court are strictly those of law, a recitation of the facts of the substantive crimes involved is unnecessary. We turn directly to the legal questions raised on this report.

1. *G. L. c. 279, § 1.* General Laws c. 279, § 1, as amended through St. 1975, c. 347 provides in pertinent part: "When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix. . . . The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of a crime punishable by death or imprisonment for life." At the time the offense was committed, the rape statute provided: "Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisionment in the state prison for life or for any terms of years." G. L. c. 265, § 22, as then amended by St. 1974, c. 474, § 1.

General Laws c. 279, § 1, prohibits the granting of a suspended sentence when a person is convicted of a crime "punishable by death or imprisonment for life." The words "punishable by death or imprisonment for life" may be clear standing alone, but the applicability of G. L. c. 279, § 1, to a variety of a statutorily proscribed offenses is not. The parties argue the question whether the prohibition against suspension of a sentence is applicable only to a crime such as murder which is punishable by death or life imprisonment, G. L. c.

265, § 2,[7] or to all crimes that carry the possibility of life imprisonment.[8]

The Commonwealth urges the court not to indulge in statutory interpretation, arguing that the meaning of G. L. c. 279, § 1, is clear. "The decisions of [the United States Supreme Court, however,] have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute . . . for 'literalness may strangle meaning,' *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 [1946]." *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962). Despite its superficial clarity, we find ambiguity in the application of the phrase "death or imprisonment for life." See *Sanker* v. *United States*, 374 A.2d 304, 307 (D.C. Cir. 1977). Put another way it becomes necessary to clarify the question whether the proscription of G. L. c. 279, § 1, applies only to those crimes for which the punishment provided is "death or imprisonment for life" or also applies to those crimes for which the punishment is "imprisonment for life or for any term of years." Taken in the context of the statutory scheme of punishment, there is ambiguity in the meaning of G. L. c. 279, § 1.

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[7]See *District Attorney for the Suffolk Dist.* v. *Watson*, Mass. Adv. Sh. (1980) 2231 (held death penalty unconstitutional).

[8]There are various crimes in this Commonwealth that are punishable by imprisonment for life or for any term of years. See, e.g., G. L. c. 265, § 13 (manslaughter during commission of offense under G. L. c. 266, §§ 101-102B); § 13B (indecent assault and battery on a child, second offense); § 17 (armed robbery); § 18A (armed assault in a dwelling house); § 21 (confining or putting in fear a person for purposes of stealing); § 22 (rape); § 24 (assault with intent to commit rape, second offense); § 24B (assault on a child with intent to commit rape); § 26 (kidnapping with intent to extort money); § 28 (poisoning with intent to injure); G. L. c. 266, § 14 (burglary, being armed).

Appendix A

"The words of a criminal statute must be such as to leave no reasonable doubt as to its meaning or the intention of the legislature . . . . " 3 C. Sands, Sutherland Statutory Construction § 59.04, at 13 (4th ed. 1974). Where the statutory language is unclear, we look to outside sources to determine the meaning of the statute. *Barclay* v. *DeVeau*, Mass. Adv. Sh. (1981) 2307, 2311. *Massachusetts Mut. Life Ins. Co.* v. *Commissioner of Corps. & Taxation*, 363 Mass. 685, 690 (1973). We turn first to the legislative history of the statute for insight into what the Legislature intended by enacting G. L. c. 279, § 1.

The Legislature amended G. L. c. 279, § 1, in 1925 by adding a new paragraph: "The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of operating a motor vehicle while under the influence of intoxicating liquor if such offence was committed within a period of six years immediately following his final conviction of a like offence by a court or magistrate of the commonwealth." St. 1925, c. 297, § 2. The following year the Legislature added to the end of the 1925 amendment: "or of a person convicted of a felony if it shall appear that he has been previously convicted of any felony." St. 1926, c. 271, § 2. In 1934 the Legislature added two more categories of crimes in which suspension of execution of the sentence was forbidden: "a crime punishable by death or imprisonment for life or of a crime an element of which is being armed with a dangerous weapon." St. 1934, c. 250, § 1. An amendment in 1936 eliminated the "operating under the influence" category, St. 1936, c. 434, § 2, and one in 1939 added a new category of election law offenses, St. 1939, c. 299, § 5. The last pertinent amendments appear in 1966 and 1967. The second felony category was deleted and the reference to particular sections of the election law was changed in 1966. St. 1966, c. 292. In 1967, the Legislature deleted the election law offenses and the crimes, "an element of which is being armed with a dangerous weapon." St. 1967, c. 333. Thus, the only category of crime remaining for which the suspension of exe-

cution of the sentence was prohibited was a crime punishable by death or life imprisonment.

This pattern of amendments is hardly helpful in evidencing the legislative intent on the issue presented for decision. The various amendments, without more, shed no light on the question whether the Legislature deleted all the other categories of offenses because it sought to prohibit suspension of execution of sentences only in murder cases or whether the Legislature intended the language to cover a broad category of felonies. Another provision of the General Laws, G. L. c. 266, § 14, however, indicates that the former interpretation is closer to the legislative intent underlying G. L. c. 279, § 1.

General Laws c. 266, § 14, defines the elements of the substantive crime of burglary while being armed and burglary coupled with making an assault. The punishment for the crime is "imprisonment in the state prison for life or for any term of not less than ten years." G. L. c. 266, §s 14, as amended. The last sentence of § 14 states that "[t]he sentence imposed upon a person who, after being convicted of any offence mentioned in this section, commits the like offence, or any other of the offences therein mentioned, shall not be suspended, nor shall he be placed on probation." *Id.* The quoted sentence was added to the statute by St. 1966, c. 330. Interestngly, as previously stated in this opinion, G. L. c. 279, § 1, was also amended in 1966 by St. 1966, c 292. Both amendments were approved in the same month of the legislative session. If the Legislature intended that the "death or life imprisonment" language of G. L. c. 279, § 1, be applicable to a crime punishable by life imprisonment or any terms of years, why did it act to amend the burglary statute shortly after amending G. L. c. 279, § 1? The last sentence of G. L. c. 266, § 14, cannot be mere surplusage. "[T]he Legislature in passing the later act must be taken to have had the provisions of the earlier one in mind, and to have intended both acts to operate as parts of one harmonious whole."

Commonwealth v. *King*, 202 Mass. 379, 388 (1909).[9] See *Eastern Racing Ass'n* v. *Assessors of Revere*, 300 Mass. 578, 581 (1938). 2A C. Sands, Sutherland Statutory Construction § 51.02, at 290 (4th ed. 1973).

We conclude also that the prohibition against suspension of execution of sentences found in G. L. c. 279, § 1, is inapplicable to crimes that carry the possibility of life imprisonment or imprisonment for a term of years by strictly construing the statute in favor of the defendant. "[O]rdinary rules of statutory construction require us to construe any criminal statute strictly against the Commonwealth." *Commonwealth* v. *Devlin*, 366 Mass. 132, 137-138 (1974), citing *Comonwealth* v. *Paccia*, 338 Mass. 4, 6 (1958). In light of the inherent ambiguity regarding the ambit of G. L. c. 279, § 1, resolution must be made in favor of the defendants in this case. *See Commonwealth* v. *Crosscup*, 369 Mass. 228, 234 (1975). See also 3 C. Sands, *supra* at § 59.04, at 13. The sentences originally imposed were legally suspended.[10]

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[9]See also G. L. c. 279, § 1A, as amended through St. 1978, c. 478, § 309, providing for suspension of execution of sentence and probation, when a person is convicted and sentenced to "fine and imprisonment." The last sentence of G. L. c. 279, § 1A, states: "This section shall not permit the suspension of the execution of the sentence of any person convicted of a crime punishable by imprisonment for life or of a crime an element of which is being armed with a dangerous weapon, or of any person convicted of any other felony if it shall appear that he has been previously convicted of any felony." These defendants had no prior felony convictions. Also, the omission of the words "or of any term of years" and the proscription of suspended sentences for the most serious offenses and repeat felony offenders seems to corroborate our analysis of legislative intent. Cf. G. L. c. 264, § 2 (treason "shall be punished by imprisonment in the state prison for life").

[10]The defendants argue on appeal that their suspended sentences were legal on the alternative theory that they ought to benefit from the mitigated penalty provided in the new statute for unaggravated rape. See G. L. c. 265, § 22, as appearing in St.

(Cont'd)

Appendix A

2. *Sentence revision.* Concluding that G. L. c. 279, § 1, does not forbid the imposition of a suspended sentence as punishment for conviction of rape, we turn to the question whether the judge had the power to revise and revoke the defendants' sentences although such sentences were legal. On October 9, 1981, the judge revoked the suspension of the execution of the sentences imposed on October 5, 1981, ordered the defendants to stand committed for terms of from three to five years at the Massachusetts Correctional Institution, Walpole, and, in accordance with Mass. R. Crim. P. 12 (c) (2) (B), 378 Mass. 866 (1979), gave leave to the defendants to withdraw their pleas of guilty. The execution of the State prison sentences was suspended pending appellate review.

The defendants contend that the judge acted illegally in two respects. First, the defendants argue that the judge had no authority un-

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(Cont'd)

1980, c. 459, § 6. At the time of the offense, January 23, 1980, former G. L. c. 265, § 22, provided that the punishment for rape was imprisonment for life or any terms of years. At the time of sentencing, October 5, 1981, G. L. c. 265, § 22, had been amended and the offense was divided into two degrees, aggravated and unaggravated rape. The defendants further argue that since the rape indictments alleged no circumstances of aggravation, their pleas of guilty were under G. L. c. 265, § 22 (*b*), unaggravated rape, for which the maximum punishment for a first offender is imprisonment in State prison for not more than twenty years. The defendants contend that the new statute mitigates the punishment for their offense and, as a general rule, the defendants may have the benefit of the mitigating law. See *Commonwealth* v. *Vaughn*, 329 Mass. 333, 338-339 (1952). Hence, they conclude G. L. c. 279, § 1, does not apply. The Commonwealth contends that the new statute is a comprehensive revision of the General laws pertaining to rape and sexual assault and not merely a change in the punishment for the offense. The Commonwealth further argues that S. 1980, c. 459, § 6, in effect, repealed former G. L. c. 265, § 22, and thus G. L. c. 4, § 6, Second, would be applicable. See G. L. c. 4, § 6, Second (repeal of a statute shall not affect punishment incurred before repeal takes effect). Since we conclude that the sentencing judge acted legally in suspending the defendents' term of imprisonment under the former G. L. c. 265, § 22, we need not reach this issue.

der Mass. R. Crim. P. 29 to increase their sentences, once imposed. Secondly, even if a judge could increase a sentence after it was imposed, because the defendants herein had begun to serve their sentences, the judge's action placed them twice in jeopardy. We conclude that the judge had authority under rule 29 to revise the defendants' sentences within sixty days of the imposition of the original sentences, and such action did not violate the defendants' rights against double jeopardy.

a. *Rule 29 of the Massachusetts Rules of Criminal Procedure.* The defendants contend that the trial judge had no authority to act on his own motion pursuant to rule 29 to revise and revoke the defendants' sentences in a way that increased the severity of the sentences. This argument ignores the actual language of rule 29[11] and principally relies on the Reporters' Notes accompanying the Rules.

The Reporters' Notes point out that rule 29 is "drawn in part" from Fed. R. Crim. P. 35. Reporters' Notes to Mass. R. Crim. P. 29, Mass. Ann. Laws, Criminal Procedure a 474 (Michie/Law. Co-op. 1979). The Reporters state further that the rule "governs *reductions* of sentences motivated by demands of fairness," and "[t]hat an increase in the sentence once execution has commenced is not permitted, has, however, long been settled" (emphasis supplied). *Id* at 475. The Reporters' Notes, not officially approved or reviewed by

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[11]Rule 29 (a) of the Massachusetts Rules of Criminal procedure, 378 Mass. 899 (1979), provides: "The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done."

this court, are not binding on this court. Additionally, rule 29, unlike Fed. R. Crim. P. 35, is limited neither to correction of illegal sentences nor to reduction of sentences.[12] Lastly, these Notes were prepared prior to the opinion of the Court in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), which, as we discuss later, has held that a sentence may, under certain conditions, be increased without violating the double jeopardy clause.

Rule 29 states that "[t]he trial judge upon his own motion' may revise and revoke a defendant's sentence within sixty days after imposition of the sentence. CF. *Commonwealth* v. *Sitko*, 372 Mass. 305, 312 (1977) (under prior practice Commonwealth could move for revocation and revision of defendant's sentence within sixty days of imposition). This power is consistent with the general responsibility of a judge to safeguard both the rights of the accused and the interest of the public in the due administration of the law. "The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." 1 ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.1 (2d ed. 1980). See *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947) ("The Constitution does not require that sentencing should be a game

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[12]Rule 35(b) of the Federal Rules of Criminal Procedure states: "The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

in which a wrong move by the judge means immunity for the prisoner").

The defendants further contend that because each had already begun to serve his respective lawful sentence, Massachusetts common law prohibits the judge's action in this case. The defendants argue that once the sentence of probation was executed in part, the court had no power to set aside the sentence and impose a new one.

The line of cases that the defendants rely upon begins with *Commonwealth* v. *Weymouth*, 2 Allen 144 (1861). In *Weymouth* the issue presented was whether the judge, after imposing one sentence, acted illegally in increasing the defendant's sentence on the Commonwealth's motion. The court, recognizing "one of the earliest doctrines of the common law," stated that "the record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered." *Id.* at 145. The court noted that the defendant was not subjected to any greater punishment by the amended sentence than that allowed by law. *Id.* at 147. The court also noted that the defendant's sentence remained wholly unexecuted, and, if the defendant had been commited under the first sentence, that particular factor "might" have changed the result in the case. *Id.* See also *Commonwealth* v. *O'Brien*, 175 Mass. 37 (1899). Because the court did not rely on that factor in concluding that the judge had acted legally, whether the defendant's sentence was executed was not crucial to or part of the holding in the case.[1] *District Attorney for the N. Dist.* v. *Superior Court*, 342 Mass. 119, 122-126 (1961).

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[1]The reasoning in the text also serves to distinguish *Commonwealth* v. *Foster*, 122 Mass. 317, 323 (1877).

Commonwealth v. *O'Brien, supra,* is also distinguishable. In *O'Brien,* the judge, at a later term, increased the defendant's sentence following his appeal. The court, noting that the defendant's previous sentence was an illegal one, held that the judge had the power to correct the illegality in this instance. See *Bozza* v. *United States, supra.* The court again stated that "a different question might have arisen" if the sentence had been executed in part. *O'Brien supra* at 40. "The circumstance that the sentence may have been partly served does not appear to have been treated in the decisions as in any way material." *District Attorney for the N. Dist.* v. *Superior Court, supra* at 122. Thus, this court has never held that the execution of the defendant's sentence is critical to the inquiry of a judge's power to revise and revoke a defendant's sentence. We note also that rule 29 substitutes a fixed time period, i.e., sixty days, for the exercise of a judge's power in lieu of the traditional — and more uncertain — common law period of "term of court." See *District Attorney for the N. Dist.* v. *Superior Court, supra.* The judge here acted promptly and within the time allowed by rule 29.

b. *Double jeopardy.* The defendants next argue that they were placed twice in jeopardy when the judge revoked the suspension of their sentences and imposed prison terms. The Fifth Amendment prohibition against double jeopardy is applicable to the States through the Fourteenth Amendment to the United States Constitution. See *Benton* v. *Maryland,* 395 U.S. 784, 793-796 (1969).[14] The constitu-

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[14] "In this Commonwealth, the subject of double jeopardy generally has been treated as a matter of common law rather than as a question under the Constitution of the Commonwealth." *Commonwealth* v. *Therrien,* Mass. Adv. Sh. (1981) 1108, 1111, citing *Commonwealth* v. *Diaz,* Mass. Adv. Sh. (1981) 605, 614-615, and *Commonwealth* v. *Cepulonis,* 374 Mass. 487, 491-492 (1978). See *Gallinaro* v. *Commonwealth,,* 362 Mass. 728, 736 (1973); Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U.L. Rev. 887, 923 (1980).

tional guarantee against double jeopardy consists of three separate protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense" (footnotes omitted). *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In other words, "the double jeopardy clause is a triptych of three separate values: (1) the integrity of jury verdicts of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose." Western, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1002 (1980). The first guarantee, viz., protection against prosecution after acquittal, is inapplicable in the instant case and thus we limit our discussion to the latter two aspects of the double jeopardy protection.[13]

(1) *Multiple punishment*. The double jeopardy clause safeguards a defendant from being twice punished for the same crime. See, e.g., *Gallinaro* v. *Commonwealth*, 362 Mass. 728, 735 (1973); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873); *United States* v. *Busic*, 639 F.2d 940, 951 (3d Cir.), cert. denied, 452 U.S. 918 (1981). Once a defendant has served fully the proper sentence prescribed by law for the offense committed, the State may not punish him again. *Id*. The Supreme Court of the United States has defined multiple punishment as that in excess of what a legislature intended to be the punishment for the particular offense. *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981). Note, *United States* v. *DiFrancesco:* Court Upholds State Initiated Sentence Appeals, 32 Mercer L. Rev. 1261, 1268 (1981). See also *Commonwealth* v. *Sneed*, 3 Mass. App. Ct. 33, 34-35 (1975), and cases cited.

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[13]A trial judge does not impliedly acquit a defendant of any greater sentence by explicitly giving him a lower sentence. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973). Cf. *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969).

Appendix A

In a recent decision, the Supreme Court held that an increase in sentence on appellate review does not constitute multiple punishment in violation of the double jeopardy clause. See *United States* v. *DiFrancesco, supra*. The Court stated: "[The] conclusion [that it does] appears to be attributable primarily to [the Court of Appeals] extending to an appeal this Court's dictum in *United States* v. *Benz*, 282 U.S. 304, 307 (1931), to the effect that the federal practice of barring an increase in sentence by the trial court after service of the sentence has begun is constitutionally based. The real and only issue in *Benz*, however, was whether the trial judge had the power to *reduce* a defendant's sentence after service had begun. The Court held that the trial court had such power. It went on to say gratuitously, however, *id.*, at 307-308, and with quotations from a textbook and from *Ex parte Lange*, 18 Wall., at 167, 173, that the trial court may not *increase* a sentence, even though the increase is effectuated during the same court session, if the defendant has begun service of his sentence. But the dictum's source, *Ex parte Lange*, states no such principle. In *Lange* the trial court erroneously imposed both imprisonment and fine, even though it was authorized by statute to impose only one or the other of these two punishments. Lange had paid the fine and served five days in prison. The trial court then resentenced him to a year's imprisonment. The fine having been paid and the defendant having suffered one of the alternative punishments, 'the power of the court to punish further was gone.' *Id.*, at 176. The Court also observed that to impose a year's imprisonment (the maximum) after five days had been served was to punish twice for the same offense. *Id.*, at 175. The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange's* specific context" (footnote omitted) (emphases in original). *United States* v. *DiFrancesco*, 449 U.S. at 138-139. Thus the defendants' commencement of execution of their sentences is not a factor that makes an increase in those sentences a violation of the double jeopardy clause. But see *United States* v. *Bynoe*, 562 F.2d 126, 128-129 (1st Cir. 1977).

Appendix A

The defendants herein pleaded guilty, inter alia, to the crime of rape which, at that time, carried the possibility of a sentence of life imprisonment or for any term of years. G. L. c. 265, § 22, as then amended by St. 1974, c. 474, § 1. At the hearing, the judge, pursuant to Mass. R. Crim. P. 29, revoked the defendants' suspended sentences and ordered them to stand committed in execution of their sentences. The defendants were not cumulatively sentenced to jail for a greater term than proscribed by the Legislature, thus, they were not punished twice for the same offense.

(2) *Finality*. The defendants contend that their expectation of finality in the original sentences is protected by the double jeopardy clause and this right was violated by the judge's action in this case. The constitutional prohibition against placing a defendant twice in jeopardy "represents a constitutional policy of finality for the defendant's benefit" in criminal proceedings. *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality). The protection against double jeopardy ensures that the State will not be allowed to make repeated attempts to convict an individual for an alleged offense, thus compelling him to live in a constant state of anxiety and insecurity. *Green* v. *United States*, 355 U.S. 184, 187–188 (1957). See also M. Friedland, Double Jeopardy 4 (1969).

We have in the past stated that "[s]entence is final judgment in a criminal case, and that is the end of the case, *apart from statutory provisions* [and common law exceptions], so far as concerns the usual and ordinary control of the court" (emphasis added). *Fine* v. *Commonwealth*, 312 Mass. 252, 256 (1942). A sentence is final, subject to the limited power of the judge pursuant to Mass. R. Crim. P. 29 to revise and revoke it. This power is limited because it may only be exercised "if it appears that justice may not have been done" within sixty days after imposition of the original sentence.

The defendants should not have had an expectation of finality in their sentences in the face of this rule. *United States* v. *DiFrancesco*,

supra at 136, appears to be dispositive of the double jeopardy claims of the defendants. There, the Court held that a sentence appealable by the Government by virtue of 18 U.S.C. § 3576 (1970) was not final until the appeal was consummated, or the time for the appeal had lapsed. The Court concluded, therefore, that the increase of a sentence in such circumstances would not constitute multiple punishment in violation of the double jeopardy clause. *Id.* at 139-140.[16] The conditional nature of a sentence under the sixty-day period for revision or revocation pursuant to rule 29 is analogous. Cf. *Commonwealth* v. *Sawicki*, 369 Mass. 377 (1975). The sixty-day requirement of rule 29, coupled with the required finding that "justice may not have been done," reasonably balances the defendant's interest in finality against society's interest in law enforcement.

3. *Resentencing procedure.* Although we conclude that the sentencing judge herein had the power to vacate the original sentences and impose new ones, the defendants were given neither notice nor an opportunity to be heard at the hearing and, thus, we order resentencing. See *Katz* v. *Commonwealth*, Mass, Adv. Sh. (1979) 2581, 2591 (remedy for error in sentencing is resentencing).

A person whose legal rights are to be affected by a hearing should have notice of the issues. Cf. *Hicks* v. *Commonwealth, 345 Mass. 89, 92 (1962), cert. denied, 374 U.S. 839 (1963). The revision proceeding denied the defendants all of the notice and hearing rights they would have had at an original sentencing proceeding under Mass R. Crim. P. 28, 378 Mass. 898 (1979), or at a revision proceeding initiated by a defendant's own motion under Mass. R. Crim.*

---

[16]We are bound, of course, by the Court's interpretation of the double jeopardy clause. We agree with the view of both the majority and the dissent in *United States* v. *DiFrancesco*, 449 U.S. 117, 133, 147 (1980), that the common law writs of autre fois acquit and autre fois convict are protections against retrial, not resentencing.

Appendix A

P. 29, or at a revision proceeding before the Appellate Division of the Superior Court under G. L. c. 278, §§ 28A-28C. We find nothing in this record to warrant the judge's precipitous action. To construe rule 29 differently from these other sentencing provisions when the trial judge acts on his own motion, would be an anomaly. The judge who seeks to revise and revoke on his own motion must give adequate notice and an opportunity to be heard to the criminal defendant. he should also state clearly on the record why it appears that "justice may not have been done" by the terms of the original sentence. "Of course, in [the circumstance where the sentences are] being revised upward, findings and a statement of supporting reasons are important to demonstrate that improper considerations did not motivate the judge's action." Commonwealth v. *Sitko,* 372 Mass. 305, 314 (1977). In the circumstances, the judge may conclude that he should recuse himself from participating in further proceedings in these cases.

4. *Disposition.* The sentences are to be vacated and the defendants are to be resentenced in a manner consistent with this opinion.

So ordered.

NOLAN, J. (dissenting). I dissent. The rape statute applicalbe to this case provides as punishment "imprisonment in the state prison for life or for any term of years." G. L. c. 265, § 22, as then amended by St. 1974, c. 474, § 1. At the time of the commission of the rape to which these defendants pleaded guilty, another statute, G. L. c. 279, § 1, provided that the execution of a sentence of a defendant convicted of a crime punishable by death or imprisonment for life shall not be suspended. Under § 22, rape is punishable by life imprisonment. It should follow, therefore, that a sentence for rape whether for life or for any term of years, cannot be suspended. The words "or for any term of years" do not render this crime any less punishable by life imprisonment if a judge chooses to impose a sentence of a term of

years. These words simply permit a less drastic sentence. It is the fact that a judge may sentence a defendant to life imprisonment that brings it under G. L. c. 279, § 1.

If the Legislature had intended the interpretation placed on the statute by the court today, it could have changed the language in one of two ways. First, the statute could have provided that the prohibition against a suspended sentence was operative only if a life imprisonment sentence were actually imposed. Second, the Legislature could have said that any sentence short of life imprisonment might be suspended. It has chosen neither option. However, the court today, by a route too tortuous for me to follow, arrives at an interpretation diametrically opposite the clear commandment of this statute. It refuses to accept the clarity of the language chosen by the Legislature in writing G. L. c. 279, § 1, and embarks on a journey of hermenneutics which leads to a conclusion which could not have been imagined by the lawmakers. The court has read doubt into a statute which is clear. It has constructed barriers to a simple and uncomplicated reading of a statute. The gloss which the court has given to the statute has created the very ambiguity on which it relies when it invokes the canon of strict construction against the Commonwealth. In short, it has taken lucid language and made it murky.

Accordingly, I dissent in the main from part 1 of the opinion. I join in the rest of the opinion except where consistency with my dissent from part 1 demands a different result.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEXANDER ALDOUPOLIS,
Plaintiff
v.
SUPERIOR COURT DEPT. OF THE
TRIAL COURT OF MASSACHUSETTS,
Defendant
CIVIL ACTION
NO. 82-1795-K
June 30, 1982
Memorandum
Keeton, D.J.:

I.

The complaint in this case seeks an injunction, attorney's fees, costs, and other relief for alleged violations of plaintiff's constitutional right, secured by the Fifth and Fourteenth Amendments, not to be placed in double jeopardy. He sues under 42 U.S.C. § 1983, asserting jurisdiction pursuant to 28 U.S.C. § 1343.

Plaintiff alleges as follows: Having been charged before the Norfolk Superior Court of rape and having there pled guilty, on October 5, 1981, he was sentenced to from three to five years at the Massachusetts Correctional Institution, Walpole (MCI Walpole); execution of sentence of imprisonment suspended; two years probation; and payment of court costs of $500 at the rate of $5 per week. Before October 9, 1981, he commenced serving his sentence by signing a probation contract and beginning payment of the imposed court costs. On October 9, 1981, the trial judge revoked the suspension of sentence and ordered plaintiff committed to MCI Walpole if he did not

elect to withdraw his guilty plea by October 13, 1981. Plaintiff obtained a stay of the Superior Court proceedings on October 9, 1981, from a single justice of the Supreme Judicial Court of Massachusetts. On May 13, 1982, the Supreme Judicial Court vacated the Superior Court sentence and ordered resentencing. On June 3, 1982, the Supreme Judicial Court denied plaintiff's motion for rehearing. Plaintiff alleges that resentencing is scheduled for 10:00 a.m. on July 1, 1982.

Plaintiff contends that the order for resentencing, entered after plaintiff had commenced serving a legally imposed sentence, violates his right, secured by the Fifth and Fourteenth Amendments, not to be placed in double jeopardy.

The matter now before the court is plaintiff's motion for a preliminary injunction prohibiting resentencing.

Neither party offered evidence at the hearing, and it does not appear that there is any relevant dispute of fact. For the purposes of ruling on this motion, I assume that the allegations stated above are factually correct.

II.

The Supreme Judicial Court, in Alexander Aldoupolis v. Commonwealth, S-2677 (May 13, 1982), determined that, under Mass. R. Crim. P. 29, a trial judge's sentence in a criminal case is subject to the condition that the trial judge may revise the sentence to a more severe one than that initially imposed, acting upon his own motion within the time period fixed by the Rule. The decision of the Supreme Judicial Court is, of course, an authoritative determination of Massachusetts law.

Appendix B

III.

Plaintiff argues that the Massachusetts law as applied to him violates his right, secured by the Fifth and Fourteenth Amendments, not to be placed in double jeopardy. This precise issue has not been previously decided by the Supreme Court. The decision most nearly in point is *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), holding that the Double Jeopardy Clause of the Fifth Amendment is not violated by the Organized Crime Control Act of 1970, 18 U.S.C. § 3576, which authorizes in limited circumstances a government appeal to seek lengthier imprisonment than was imposed by the trial judge. The Court's opinion (in which five members of the Court joined) at one point (in part V) states the holding in a way that may be read narrowly:

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

449 U.S. at 139. One might reasonably argue that no state law comparable to the dangerous special offender statute is involved here and that this case is thus outside the reach of *DiFrancesco*. Earlier in the Court's opinion in that case, however, a rationale of broader reach is developed. For example:

> It is acquittal that prevents retrial even if legal error was committed at the trial. *United States* v.

Ball, 163 U.S. 662 (1896). This is why the "law attaches particular significance to an acquittal." *United States* v. *Scott*, 437 U.S., at 91. Appeal of a sentence, therefore, would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial. Put another way, the argument would be that, for double jeopardy finality purposes, the imposition of the sentence is an "implied acquittal" of any greater sentence.

* * *

We agree with the Government that this approach does not withstand analysis.

* * *

Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. . . . The trial court's increase of a sentence, so long as it took place during the same term of court, was permitted. This practice was not thought to violate any double jeopardy principle. . . . This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence. *See, e.g., United States* v. *DiLorenzo*, 429 F.2d 216, 221 (CA2 1970), cert. denied, 402 U.S. 950 (1971); *Vincent* v. *United States*, 337 F.2d 891, 894 (CA8 1964), cert. denied, 380 U.S. 988 (1965). Thus is

> may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution.

Id. at 132-34.

Although *DiFrancesco* is not directly in point, the rationale of the Court lends support to the Commonwealth's position here. In these circumstances, I conclude that the plaintiff has failed to show probability of success on the merits of his Double Jeopardy claim. Because of plaintiff's failure to meet this essential requirement of injunctive relief, I need not and do not consider whether other prerequisites to a preliminary injunction are satisfied. Also, I do not consider whether in any event this court should abstain, see *Younger* v. *Harris*, 401 U.S. 37 (1971),[1] or should treat this complaint as analogous to a petition for habeas corpus and apply requirements applicable in that context.[2]

Plaintiff's motion for preliminary injunction must be denied.

United States District Judge

---

[1]Under the doctrine of *Younger* v. *Harris* and *Samuels* v. *Mackell*, 401 U.S. 66 (1971), federal courts are barred from enjoining state criminal proceedings "except in very unusual situations, where necessary to prevent immediate irreparable injury," *Samuels* at 69, which is "'both great and immediate,'" *Younger* at 46, quoting *Fenner* v. *Boykin*, 271 U.S. 240, 243 (1926). It may be doubted that what plaintiff faces here—the possibility of the revocation of probation at resentencing—satisfies the "irreparable injury" requirement.

[2]Plaintiff, in requesting relief under 42 U.S.C. § 1983, may be proceeding under the wrong statute. It is at least arguable that habeas corpus, 28 U.S.C. § 2254, is the exclusive remedy of a plaintiff who challenges "the very fact or duration" of his

(Cont'd)

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEXANDER ALDOUPOLIS,
Plaintiff
v.
SUPERIOR COURT DEPT. OF THE
TRIAL COURT OF MASSACHUSETTS,
Defendant
CIVIL ACTION
NO. 82-1795-K

June 30, 1982
ORDER

For the reasons stated in the Memorandum of this date, it is ORDERED:

Plaintiff's Motion for Preliminary Injunction is denied.

United States District Judge

(Cont'd)

confinement, *Preiser* v. *Rodriguez*, 411 U.S. 475, 500 (1973), including challenges to "future confinement," *id.* at 487. Were plaintiff requesting habeas relief, his request for bail, the habeas analogue to a 1983 request for a temporary restraining order or a preliminary injunction, would be denied because of his inability to present "a clear case on the law," see *Eaton* v. *Holbrook*, No. 81-1884 (1st Cir. March 5, 1982); *Glynn* v. *Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972). Plaintiff, of course, may return to federal court for a full adjudication of any habeas claim; in that case, he will have to establish that he is held "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254 (a) and that he has exhausted available state remedies, 28 U.S.C. § 2254 (b).

APPENDIX C

May 25, 1982

The Honorable Edward F. Hennessey
Chief Justice
Supreme Judicial Court
New Courthouse
Pemberton Square
Boston, MA 02108

RE[obPETITION FOR REHEARING
MARK S. SAVOY v. COMMONWEALTH
ALEXANDER ALDOUPOLIS v. COMMONWEALTH
RICHARD DOVEL v. COMMONWEALTH
JOHN STRICKLAND v. COMMONWEALTH
ROBERT J. TARR v. COMMONWEALTH
Supreme Judicial Court No. 2677

Dear Justice Hennessey:

Please accept this letter as a petition for rehearing pursuant to Mass.R.App.P. 27 in the above captioned matter. The petitioners (hereinafter the "defendants") contend that the following points of law have been overlooked and misapprehended by this Court.

I. The defendants submit that the framing of the disposition by this Court is inconsistent with the Court's opinion.

It is uncontroverted that the Superior Court Judge originally imposed three to five year Walpole sentences, suspended, one year probation and five hundred dollars in court costs upon the defendants; and that, four days later, he revised and revoked the sentences without prior notice to the parties, and imposed a commited three to five

year Walpole sentence, citing as grounds the "questioned validity" of the suspended sentences, and "the statements of the District Attorney objecting to [his] . . . imposing a suspended sentence, as well as a desire to have this case tried on its merits" (R.186).

This Court has now held that the original suspended sentences were legally imposed, that the trial judge did have the power to revise and revoke the sentences on his own motion so as to increase their severity, but that the defendants were not afforded proper notice and an opportunity to be heard on the issue of a revision and revocation of the sentences, and thus the trial judge's resentencing was invalid.

Such being the holding of this Court, it is now incongruous to remand specifically for *resentencing*. The original suspended sentences were valid, and the subsequent revision and revocation was vacated. We are thus left with existing, valid sentences.* It is inappropriate to remand for resentencing because the defendants have already been properly sentenced.**

---

*The general principle that an original act remains valid if a subsequent attempted revocation of that act is found to be invalid flows through many areas of our law. In the subject matter of wills, the doctrine is called dependent relative revocation, and may be stated simply that where a testator purports to revoke his prior will while laboring under a mistake of law or fact, revocation is dependent upon the existence of the situation as believed by the testator and accordingly the original will is not revoked. See Atkinson, *Law of Wills*, at 452-53 (Hornbook Series, 2d Ed.). See also *Sanderson* v. *Sanderson*, 242 Mass. 43, 45 (1922). Similarly, in the law of contracts, if a contract substituted for an original is found defective and thus legally invalid, the original is resurrected and held valid. See Restatement, *Contracts*, §223(2); Corbin on Contracts, §312 at 123 (1950).

**_Katz_ v. _Commonwealth_, Mass.Adv.Sh. (1979) 2581, cited by this Court in support of its order for resentencing, is inapposite. _Katz_ involved a criminal contempt proceeding during which the trial judge sentenced the defendant in the defend-

Appendix C

It would be consonant with the body of this Court's decision to remand the matter to the lower court *for action consistent with this Court's opinion*. Such a directive would leave it open to the lower court judge to take any action at all. It may be that the original sentencing judge, or his substitute in the event of recusal, will decide that this Court's holding that the original suspended sentences were valid obviates the need for resentencing. Or the judge may reconsider the grounds for the revision and revocation, and conclude that an alteration of the existing sentence is not called for.*

In any event, a disposition by this Court placing no specific onus upon the trial court to take any action, whether it be resentencing or otherwise, more properly reflects the opinion of this Court. Therefore, the defendants respectfully request that this Court amend its disposition to read: The sentences imposed on October 9, 1981, are to be vacated, and the matter is remanded to the court below for action consistent with this opinion.

II. The opinion fails adequately to address the specific factual situation of this case, and the problems which might arise in future cases, where criminal defendants plead guilty upon a joint sentence recommendation, the trial judge accepts the recommendation, but later revises the sentence upwards.

(Cont'd)

ant's and his counsel's absence. *Id.*, at 2590. This Court's determination that Katz's sentence had to be vacated did not leave any pre-existing sentence intact, as in the present case. Thus resentencing was necessary in that case because no valid sentence was extant.

*Since the initial sentences were valid, the trial judge's only remaining stated grounds for revision and revocation are the "public interest in the sentences". Surely public interest, or even disinterest, is an improper criterion for increasing the severity of a criminal sentence. CF. *Commonwealth* v. *Sitko*, 372 Mass. 305 (1977).

Appendix C

This Court, in ordering resentencing, has failed to consider that the court below offered the defendants an option to stand committed upon the amended sentence, or to withdraw their guilty pleas pursuant to Mass.R.Crim.P. 12 (c) (2) (b)** and proceed to trial. This Court's disposition, in ignoring any reference to this option, appears to rescind such an opportunity.

This question should be addressed, either in the text of the opinion or in the disposition, not only for guidance to these defendants and the trial court in the instant case, but for purposes of clarifying the interrelationship between Mas.R.Crim.P. 12 and 29 in future matters.

> Section (c) (6) of Rule 12 provides:
>
> If the judge determines that he will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b) (1) (C) of this rule or an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), after having informed the defendant as provided in subdivision (c)(2)(A) that he would not do so, he shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that he intends to exceed the terms of the plea recommendation and shall afford the defendant the opportunity to then withdraw his plea. The judge may indicate to the parties what sentence he would impose.

**Perhaps the judge intended to invoke Mass.R.Crim.P. 12(c)(2)(A), which allows the judge to inform the defendant that, if he decides to exceed a sentence recommendation, the defendant may withdraw his plea.

Thus, where a trial judge has informed a defendant under Rule 12(c)(2)(A)that he will not exceed a sentence recommendation made pursuant to Rule 12(b)(1)(c) or (E) without first affording the defendant an opportunity to withdraw the plea, and he does indicate that he will exceed the recommendation, he must give the defendant a chance to withdraw his plea.

The Court's ruling in this case raises doubt that a judge is so confined by Rule 12(c)(6) when later revising a sentence on his own motion under Rule 29. Of course, he should be, and this Court should explicitly state that Rule 29 must be read in light of the requirements of Rule 12(c)(6), and order that the defendants here may also withdraw their guilty pleas if the trial judge exceeds the original sentence upon resentencing.

III. This Court's holding that the trial judge's action in increasing the defendants' sentences under Mass.R.Crim.P. 29 did not violate the double jeopardy clause is legally unsound.

This Court concluded that the defendants' arguments that a criminal defendant's interest in the finality of his sentence, an interest protected through the Double Jeopardy Clause, see, e.g., *United States* v. *Jorn*, 400 U.S. 470, 479 (1971), are disposed of by the United States Supreme Court's decision in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980). They are not.

DiFrancesco involved a Federal statute (18 U.S.C. §3576) which permitted appeals by the Government from a sentence of a criminal defendant designated as a "dangerous special offender". The language of that statute is, as the Court pointed out, *id*, at 138–139, clear and incapable of misunderstanding:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under sec-

> tion 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant *or the United States* to a court of appeals.

18 U.S.C. §3576 (emphasis added). Accordingly, the Court concluded that a defendant's interest in the repose of his sentence has no bearing "where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal". *Id.*, at 139.

Rule 29 had no such clarity for these defendants, nor for anyone else. Rule 29 is essentially no different from its predecessor, G.L. c.278, §29. Through a long line of Massachusetts cases, reflected in the Reporter's Notes following the rule, it had always been said that a sentence could not be revised upwards upon the initiative of the court or the prosecution when execution of the sentence had commenced. See, e.g., *District Attorney for the Northern District* v. *Superior Court*, 343 Mass. 119, 125-126 (1961); *Commonwealth* v. *Fine*, 312 Mass. 252, 256 (1942). Granted no Massachusetts case had specifically condemned an upward sentence revision after the start of execution; but all pronouncements by this Court certainly led to that conclusion. Hence, if a specifically worded statute permitting an increase in a sentence is required to avoid double jeopardy implications, as *DiFrancesco* says it is, then Rule 29 does not pass constitutional muster for these defendants. Whatever may be the expectation of finality for future defendants under Rule 29 as a result of this decision, it cannot be said that these defendants were put on proper notice that their sentences were subject to review and increase upon the court's motion.

The defendants' finality argument is made more forceful by the ambiguity in the Court's decision concerning the time limitations

imposed upon a judge's revision of a sentence. It has, of course, been the long-standing practice for criminal defendants to file their motions to revise and revoke within the sixty day period, and then move for a hearing when the time seems most propitious. See *Commonwealth* v. *Layne*, Mass.Adv.Sh. (1982) ____. It would be highly anomalous to read Rule 29 as requiring a different standard for the judge. If such is the case, the Court's determination that the "sixty day requirement of Rule 29" satisfies the defendants' interest in finality is misplaced, because, under exisiting practice, the filing of the motion to revise and revoke within the sixty day period permits hearing and action upon the motion within a reasonable period following the expiration of the sixty days. If this Court is imposing a strict sixty day requirement upon the trial judge to move *and act* upon the revision and revocation, it should clearly say so, and, possibly, explain what language in Rule 29 permits the different treatment.

Therefore, the defendants request that this Court hold that the action of the court below in increasing their sentences violated the Double Jeopardy Clause.

Very truly yours,

P. J. PISCITELLI
Attorney for
Mark S. Savoy

STEPHEN HRONES
Attorney for
Alexander Aldoupolis

MARIE T. BUCKLEY
Attorney for
Richard Dovel

WILLIAM T. PRITCHARD
Attorney for
John Strickland

JOSEPH R. WELCH
Attorney for
Robert J. Tarr

PJP:mab

cc: Charles J. Hely, Esq.
Assistant District Attorney
Norfolk County

APPENDIX D

JUNE 3, 1982

P.J. Piscitelli, Esq.
281 Pleasant Street
Brockton, Massachusetts 02401-0837

Re: *Alexander Aldoupolis* vs. *Commonwealth*
(and four companion cases)
Supreme Jucicial Court No. SJC-2677

Dear Mr. Piscitelli:

With reference to the above captioned case your Petition for Rehearing has been considered by the court and is denied. Your Motion to File Petition Late was allowed.

Very truly yours,

Clerk

cc: Charles J. Hely, A.D.A.
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Appendix D

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APPENDIX E

1. G.L. c. 265, §13A, amended by St. 1945, c.230, provides:

Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.

A summons may be issued instead of a warrant for the arrest of any person upon a complaint for a violation of any provision of this section if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons.

2. G.L. c.265, §22, inserted by St. 1974, c.474, §1 (subsequently amended by St. 1980, c.459, §6) provides:

Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years.

3. G.L. c.266, §127, amended by St. 1978, c.544, provides:

Whoever destroys or injures the personal property, dwelling house or building of another in any manner or by any means not particularly described or mentioned in this chapter shall, if such destruction or injury is wilful and malicious, be punished by imprisonment in the state prison for not more than ten years of by a fine of three thousand dollars or three times the value of the property so destroyed or injured, whichever is greater and imprisonment in jail for not more than three years; or if such destruction or injury is wanton, shall be punished by a fine of fifteen hundred dollars or three times the value of the property so destroyed or injured, whichever is greater, or by

imprisonment for not more than three years; if the value of the property so destroyed or injured is not alleged to exceed one hundred dollars, the punishment shall be by a fine of three times the value of the damage or injury to such property or by imprisonment for not more than three months; provided, however, that where a fine is levied pursuant to the value of the property destroyed or injured, the court shall, after conviction, conduct an evidentiary hearing to ascertain the value of the property so destroyed or injured.

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS.
SUPERIOR COURT
Nos. 76300–324

COMMONWEALTH

vs.

ROBERT J. TARR, MARK SAVOY
JOHN STRICKLAND, RICHARD DOVEL
and ALEXANDER ALDOUPOLIS

Dedham, Mass., October 9, 1981
(Second Criminal Session)

Before

ABRAMS, J.

Appearances: GERALD KIRBY, ESQ., Assistant District Attorney, for the Commonwealth
JOSEPH R. WELCH, ESQ., for defendant Tarr.
TERRANCE J. MCCARTHY, ESQ., for defendant Savoy
WILLIAM H. PRITCHARD, ESQ., for defendant Strickland.
MARIE T. BUCKLEY, for defendant Dovel.
STEPHEN HRONES, ESQ., for defendant Aldoupolis

URSULA E. NURSE
Official Court Reporter

Appendix F

THE CLERK: Let the record show that this is a hearing on a series of cases, Commonwealth vs. Robert Tarr, Mark Savoy, John Strickland, Richard Dovel and Alexander Aldoupolis.

Let the record show that the defendants and their counsel are present in the courtroom, as is Mr. Kirby, representing the Commonwealth.

THE COURT: Presently, because of public interest in the sentences that I have imposed I have convened these proceedings to state my reasons publicly.

Based on the facts and circumstances presented to me on October 5, 1981, by the Assistant District Attorney and defendants' counsel, including what I consider to be a recommendation of a light sentence by the Assistant District Attorney that would amount to at most a one year to be served at Concord Reformatory, which recommendation was made prior to my accepting the defendants' offer to change their plea to guilty, it was my opinion that the imposition of a three to five year Walpole State Prison sentence, suspended, with two years of supervised probation on a weekly basis until October of 1983, was an appropriate disposition under the facts and circumstances then presented to me in a lobby conference. This included the fact that the government's chief witness was an active participant who, on the basis of receiving from the District Attorney a letter of intent not to prosecute, received immunity and who, it was alleged, had given inconsistent statements; the fact that the victim, who now resides in western Massachusetts, was unavailable to testify; and the fact that each of the defendants steadfastly maintained that what occurred was consensual; also, the imposition of twenty-five hundred dollars in court costs was to reimburse the District Attorney's office for monies and expenses incurred in bringing the immunized sixth participant, now a marine, from Hawaii, plus other expenses, I informed the de-

fendants in open court, in no uncertain terms that a violation of any condition of their probation during the next two years would subject them to incarceration at Walpole State Prison for a minimum of two years.

I reviewed their individual probation reports. They were all first offenders, all from very close, supportive families, something I see very infrequently today, and all were very contrite as to their actions on the night in question. I felt that confinement was not necessary in order to protect the public from further criminal activities of the defendants, nor were they in need of correctional treatment which could most effectively be provided if they were placed in total confinement.

Also, the American Bar Association standards on sentencing alternatives state, "Community hostility is not a legitimate basis for imposing a sentence of total confinement."

In addition, the recommendation of so light a sentence by the Assistant District Attorney indicated to the Court, as a former Assistant District Attorney himself, a possible weakness in the Commonwealth's case; and I, therefore, felt that the imposition of a suspended State's prison sentence could be more reasonable under all the circumstances.

Occasions inevitably will occur where a Judge, upon receipt of other information, will feel that due weight to all the factors was not taken into account on the imposition of sentencing, such as the situation presented here as regards to the suspension of the sentence imposed and its questioned validity under the statute, although there is a variance in legal opinion, especially in view of the new rape staircasing statute, I feel that after a careful reading of General Laws Chapter 279, section 1 and 1A, the imposition of a suspended Walpole Prison sentence on a crime charged under Chapter 265, section 22, may have been illegal.

Appendix F

In view of the statements of the District Attorney objecting to my imposing a suspended sentence, as well as a desire to have this case tried on its merits, I am today, in accordance with the Massachusetts Rules of Criminal Procedure 29, revoking the suspension of the execution of the sentence imposed by the Court on October 5, 1981, on Robert J. Tarr, Mark Savoy, John Strickland, Richard Dovel and Alexander Aldoupolis, which will now read: Three to five, M.C.I. Walpole, committed. And in accordance with Massachusetts Rules of Criminal *Procedure 12(C)(2)(B)(A) allow the defendants to withdraw their pleas of guilty and order their cases to stand for trial on the merits during the criminal jury session which commences February 1, 1982.*

Mr. Flukes will prepare the proper order in this regard for Tuesday, October 13, 1981, at which time counsel may appear or may by motion file their withdrawal of pleas.

Thank you.

(END OF PROCEEDINGS)

I, Ursula E. Nurse, Official Court Reporter for Norfolk County, do hereby certify that the foregoing is a true and accurate transcript of the proceedings before ABRAMS, J., in the Second Criminal Session at Dedham, on Friday, October 9, 1981, in Norfolk Criminal Cases, numbered 76300 through 76324, COMMONWEALTH vs. ROBERT J. TARR, MARK SAVOY, JOHN STRICKLAND, RICHARD DOVEL and ALEXANDER ALDOUPOLIS.

Official Court Reporter

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 81-335 CIVIL

COMMONWEALTH OF MASSACHUSETTS
vs.
ALEXANDER ALDOUPOLIS

ORDER STAYING PROCEEDINGS

This matter came before the Court *ex parte* on the defendant's motion to enjoin the proceedings in Norfolk Superior Court No. 73620-21.

Upon consideration of the Motion it is ORDERED that the above-described proceedings be stayed until the close of business, Wednesday, October 14, 1981; it is further ORDERED that this matter be argued before the Single Justice of this Court at 9:30 A.M. on Wednesday, October 14, 1981.

By the Court, (Lynch, J.)

Clerk

Entered: October 9, 1981
A true copy,
Attest:
October 9, 1981 Assistant Clerk

APPENDIX H

R.189

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
COMMONWEALTH OF MASSACHUSETTS
vs.
ALEXANDER ADOUPOLIS (NO. 81-335 CIVIL)

COMMONWEALTH OF MASSACHUSETTS
vs.
RICHARD DOVELL (NO. 81-336 CIVIL)

COMMONWEALTH OF MASSACHUSETTS
vs.
JOHN STRICKLAND (NO. 81-339 CIVIL)

COMMONWEALTH OF MASSACHUSETTS
vs.
MARK SAVOY, Defendant (NO. 81-342 CIVIL)

COMMONWEALTH OF MASSACHUSETTS
vs.
ROBERT J. TARR (NO. 81-343 CIVIL)

RESERVATION AND REPORT OF QUESTIONS
PRESENTED BY THE DEFENDANTS' PETITIONS
FOR RELIEF UNDER G.L. c. 211, § 3
FINDINGS OF FACT

The Commonwealth does not contest the following facts:

The defendants listed above, pleaded guilty to charges of rape, unnatural rape, and malicious destruction of property, on October 5, 1981 in Norfolk County Superior Court. All the defendants received

sentences of three to five years at Walpole on each charge. The sentences were suspended and the defendants were placed on probation for two years. They were also ordered to pay five hundred dollars in court costs. The defendants were required to appear again before the same judge in Norfolk Superior Court on October 9, 1981. Less than twenty-four hours' notice was given of the hearing on October 9, 1981 and the purpose of the hearing was not disclosed at the time notice was given.

At the hearing the trial judge expressed doubt as to the legality of his original sentence and, purporting to act in accordance with Mass. Rules of Criminal Procedure 29, issued the following order:

> "It is ordered that the suspensions of the execution of the sentences imposed in the above entitled matters on October 5, 1981 is hereby revoked. (Mr Cr P 29). The defendants shall stand committed in execution of these sentences for a term of not less than 3 years nor more than 5 years, at hard labor at our Massachusetts Correctional Institution, Walpole. The Court stays execution of these sentences pending further order of this court or an Appellate court. Pursuant to the provisions of the MR Cr P 12 (c) (2) (B). The defendants are granted leave to withdraw their pleas of guilty and stand for a trial on the merits during the February criminal session. The defendants are released on their own personal recognizance pending further order of this Court. Action otherwise disposing of related companion cases is vacated and those matters are returned to the trial list."

Prior to October 9, 1981, the defendants reported to the probation officer, signed probation contracts and made partial payments of the court costs imposed, in accordance with the original sentence.

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PRIOR PROCEEDINGS

On October 9, 1981, the defendant Aldoupolis, filed with this court a pleading characterized as a "Motion to Enjoin" asking that this court stay the ruling of the Superior Court and determine the legality of the trial judge's withdrawal of the suspended sentences. I issued a stay of the Superior Court order until the close of business on October 14, 1981, and scheduled the matter for hearing at 9:30 on October 14, 1981. At or prior to the hearing, the defendants Dovell, Tarr and Savoy filed motions to intervene. The defendant Strickland filed a petition seeking relief under G. L. c. 211, § 3. After oral argument on October 14, 1981, the matter was continued until October 20, 1981 in order to give the parties an opportunity to obtain a transcript of the Superior Court proceedings and to file such additional pleadings as they might deem neessary. On or before October 20, 1981, the defendants Dovell, Tarry and Savoy, filed "Petition[s] for relief under Ch. 211, § 3," and the defendant Aldoupolis filed a pleading characterized as a "Petition pursuant to Mass. G.L. c. 211, § 3 in the nature of an application for writ of prohibition." The district attorney for Norfolk County appeared for the Commonwealth in opposition to all of the defendants' motions and petitions. The Attorney General filed a "Motion to Intervene" on behalf of the Trial Court of the Commonwealth, in the cases involving Strickland, Savoy, Tarr and Dovell. This unopposed motion was allowed in open court. The Attorney General also filed motions to dismiss in those cases in which he had intervened.

DISCUSSION

The defendants collectively raised the following issues, although not all of the issues are raised by all of the defendants:

1. Since the original sentence imposed by the trial judge was a legal sentence, he had no right to revise and revoke the sentence under Mass. R. Crim. P. 29;

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2. Even if the trial judge had the right to revise and revoke the sentence, he cannot increase the sentence without violating the defendants' right to be free from double jeopardy;

3. The trial judge did not have the authority under Rule 29 of the Mass. R. Crim. P. to increase the defendants' sentence once it had been executed; and

4. The defendants were denied due process by the failure of the trial judge to notify them that the purpose of the hearing on October 9, 1981 was to revoke their suspended sentences, or to allow the defendants to be heard in opposition to the revocation of their sentences.

If the original suspended sentence was illegal, it was proper for the trial judge to have revoked sentence. *Commonwealth* v. *Sitko*, 372 Mass. 305, 314 (1977). If, on the other hand, the suspended sentences were legally imposed, issues of double jeopardy raised by the defendants must be decided. Some of these issues apparently have not been resolved either by Massachusetts courts or those of the Federal system. The legality of the original suspended sentences depends upon the construction of G.L. c. 279, § 1, which provides in part, that "[t]he provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of a crime punishable by death or imprisonment for life." The issue of statutory construction raised by the defendants, therefore, is whether a crime like rape which was punishable under former G.L. c. 265, § 22 (repealed by Stat. 1981, c. 459, § 6) by imprisonment for life or any term of years is, "a crime punishable by death or imprisonment for life" under G.L. c. 279, § 1. The defendants argue that the words "death or imprisonment for life" in § 1 should be read as one expression. Under this reading, § 1 would prohibit suspension of sentences only in first degree murder cases. The Commonwealth argues, however, that the prohibition of suspension applies more broadly to all

crimes for which life imprisonment is possible. Under the Commonwealth's interpretation of the statute, a suspended sentence would be prohibited not only in the case of first degree murder but for any crime punishable by life imprisonment. After reviewing the relevant cases and statutes, I have found that no clear answer emerges.

Unless this court exercises its jurisdiction under G.L. c. 211, § 3, or unless some other remedy is available to the defendants, they will be put in the position of having to decide whether to go to jail or to stand trial in order to have this question adjudicated by an appellate court. In this situation there is, at least, threshold validity to the defendants' double jeopardy claims.

CONCLUSION

A criminal defendant who presents a double jeopardy claim of substantial merit is entitled to a review of that claim before the second trial. *Costarelli* v. *Commonwealth*, 374 Mass. 677, 680 (1978). A civil action in the nature of prohibition now seems to be the appropriate mode of proceeding to obtain an interlocutory review of a double jeopardy claim. *Fadden* v. *Commwealth*, 376 Mass. 604 (1978). See also Mass. R. Civ. P. 81B, as amended, 365 Mass. 841 (1974). Courts in other jurisdictions have also held that the writ of prohibition or its statutory successor is the proper procedure for interlocutory review of double jeopardy claims. *Cardenas* v. *Superior Court of Los Angeles County*, 56 Cal. 2d. 273, 275 (1961); *Abraham* v. *Supreme Court*, 37 N.Y. 2d, 560, 564 (1975). Although certain changes in the forms of procedure have taken place in recent years, a civil action in the nature of prohibition may still be brought in this court. *Fadden* v. *Commonwealth*, supra at 607; *Washburn* v. *Phillips*, 2 Met. 296, 298-299 (1841). If the plaintiff in such an action seeks relief from a proceeding initiated in any court other than this court or the Appeals Court, the case may be transferred to the Appeals Court under G.L. c. 211, § 4A.

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As single justice of the Supreme Judicial Court for Suffolk County, I have a number of options, among them: 1) exercising this court's power of general superintendence over the courts by allowing interlocutory review of the defendants' double jeopardy claim, and then transferring the case to a single justice of the Appeals Court for decision on the merits of the claim, *Fadden* v. *Commonwealth*, supra at 608; 2) treating the case as an action to obtain that relief formerly made available by writ of prohibition and transferring the case to a single justice of the Appeals Court for review and evaluation, *Id.*; 3) deciding the merits of the double jeopardy claim; or 4) reporting the issues presented to the Full Court. Several of the issues raised by the defendants appear to be of first impression, and the likelihood of an appeal from any decision reached by me or by a single justice of the Appeals Court is great. Considerations of justice and the public interest require an expeditious disposition of these cases.

If the parties agree, they may file a supplementary statement of facts within ten days of the date hereof. If the parties contest any of the facts found herein, they may file objections within three days of the date hereof.

This case is reserved and reported to the Full Court of the Supreme Judicial Court for its hearing and decision of the legal questions arising therefrom on the following record:

1. The Petitions seeking relief under G.L. c. 211, § 3 the Motion to Enjoin; the Motion pursuant to G.L. c. 211, § 3, in the nature of a Writ of Prohibition; the Motion to Intervene of the Attorney General of the Commonwealth; the Commonwealth's Opposition to the Defendants' Petitions; the Commonwealth's Motion to Dismiss; a Supplementary Statement of Facts, if any; the transcript of the hearings in the Superior Court and

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2. A copy of this "Reservation and Report." The principal questions raised by this Reservation and Report are the following:

1. Does G.L. c. 279, § 1, prohibit the suspension of the three to five year sentence at Walpole imposed for commission of the crime of rape under former G.L. c. 265, § 22?

2. Can a Superior Court Judge, acting upon his own motion, under Mass. R. Crim. P. 29, vacate a suspended sentence and impose a jail sentence within five days of the original sentence where the defendants, acting in accordance with the original sentence, have reported to the probation officer, signed probation contracts, and paid some portion of the court costs imposed?

3. If the answer to question 2 is in the affirmative, can the trial judge take the action therein described upon less than twenty-four hours' notice to the defendants and without any prior notification of the purpose of the hearing?

NEIL L. LYNCH
November 18, 1981 ASSOCIATE JUSTICE

A TRUE COPY:
ATTEST:
NOVEMBER 18, 1981 CLERK OF COURT

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARK S. SAVOY,
Plaintiff

v.

THE SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT,
Defendant

CIVIL ACTION
NO. 82-1813-K

June 30, 1982

ORDER

For the reasons stated in the Memorandum filed this date in Alexander Aldoupolis v. Superior Court Department of the Trial Court of Massachusetts, C.A. No. 82-1795-K, it is ORDERED:

Plaintiff's Motion for Preliminary Injunction is denied.

United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1532.

MARK S. SAVOY,
Plaintiff, Appellant,

v.

THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS,
Defendant, Appellee.

No. 82-1533.

ALEXANDER ALDOUPOLIS,
Plaintiff, Appellant,

v.

THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS,
Defendant, Appellee.

ORDER OF COURT

Entered June 30, 1982

For the reasons stated by the district court the motions seeking to enjoin the proceedings in the state court pending appeal are denied.

Appendix J

By the Court:

Clerk.

[Cert. c., Clerk, U.S.D.C., Mass.; cc: Mr. Hrones, Mr. Piscitelli and Ms. Smith.]

APPENDIX K

SUPREME JUDICIAL COURT
for
SUFFOLK COUNTY
Civil Action
No.

Norfolk, ss
MARK S. SAVOY, ROBERT J. TARR
and RICHARD DOVEL,
Petitioners

v.

THE SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT,
Respondent
PETITION FOR RELIEF PURSUANT
TO M.G.L. c.211, S.3

Now come the petitioners, Mark S. Savoy, Robert J. Tarr and Richard Dovel, and petition this Court for relief pursuant to M.G.L. c.211, S.3, as follows:

1. The petitioner Mark S. Savoy presently resides at 14 Rose Way, Holbrook, Massachusetts.

2. The petitioner Robert J. Tarr presently resides at 310 Union Street, Holbrook, Massachusetts.

3. The petitioner Richard Dovel presently resides at 39 Summer Street, Holbrook, Massachusetts.

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4. The respondent Superior Court Department of the Trial Court has its principal place of business at the Court House, Pemberton Square, Boston, Massachusetts.

5. The petitioners were indicted by a Norfolk County Grand Jury on August 5, 1980, on charges of rape under M.G.L. c.265, S.22 (Indictment Nos. 76308, 76300 and 76316); unnatural rape under M.G.L. c.265, S.22 (Indictment Nos. 76309, 76301 and 76317); malicious destruction of property under M.G.L. c.266, S.127 (Indictment Nos. 76310, 76302 and 76318); and assault and battery under M.G.L. c.265, S.13A (Indictment Nos. 76311, 76303 and 76319). They were arraigned on these charges in the Superior Court Department, Norfolk Division, on August 7, 1980, and pled not guilty.

6. The petitioners' cases were continued approximately seven times until October 5, 1981, at which time they were designated the first cases out. When the petitioners appeared on October 5, 1981,the court (per Herbert Abrams, J., Associate Justice of the Superior Court) ordered that a conference be called to "see where we are going in this case, and to see how we work it out . . . . " (A copy of the relevant portion of the transcript of the proceedings on October 5, 1981, concerning this matter in the Norfolk County Superior Court is attached hereto as Exhibit "A" and incorporated by reference.)

7. A conference was conducted which went unrecorded. When the parties returned on the record, the petitioners agreed to change their pleas to guilty, and after doing so, were sentenced to three-to-five year terms at M.C.I., Walpole, suspended, two years probation, and court costs in the amount of Five Hundred Dollars. The petitioners reported to their probation officer, signed a probation contract, and commenced paying the Five Hundred Dollars in court costs at the rate of Five Dollars per week, which payments have been made consistently since that date.

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8. On October 8, 1981, then counsel for petitioners were informed by the office of the Clerk of the Norfolk County Superior Court that they and their clients were to appear before Judge Abrams the next day on October 9, 1981. No reason was given for the appearance.

9. The petitioners and their counsel did appear on October 9, 1981, as ordered. Judge Abrams revoked the suspension of the execution of the sentences imposed on October 5, 1981, and imposed three-to-five year Walpole terms, committed. However, in accordance with Rule 12 of the Massachusetts Rules of Criminal Procedure, Judge Abrams allowed the petitioners to withdraw their pleas of guilty and stand trial during the next criminal jury session. (A copy of the transcript of the October 9, 1981, proceedings in the Superior Court Department, Norfolk Division, is attached hereto as Exhibit "B".)

10. The petitioners appealed the revocation of their sentences to the Single Justice of this Court and the matter was reserved and reported to the full bench of the Supreme Judicial Court for the Commonwealth. On May 13, 1982, the Court issued an opinion upholding the trial judge's right to revoke petitioners' initial sentences and remanding the matter for resentencing. (A copy of said opinion is attached hereto as Exhibit "C".) Said opinion left unanswered the question of whether or not petitioners would be allowed to withdraw their pleas.

11. The petitioners appeared in the Superior Court Department, Norfolk Division, on July 1, 1982, for resentencing. At that time petitioner Savoy filed a motion to withdraw his guilty plea, stating that an offer to allow him to withdraw the plea had been made by Judge Abrams on October 9, 1981. (A copy of said motion to withdraw his guilty plea is attached hereto as Exhibit "D".) Petitioner Tarr was prepared to submit a written motion to that same effect. Both petitioners, as stated in petitioner Savoy's motion, were filing such motions

only to avoid resentencing and incarceration and expressly reserved their rights to pursue their claims that said resentencing and retrial violated the double jeopardy clause. A similar motion to withdraw his guilty plea was filed by co-defendant Alexander Aldoupolis. Said motion was denied in open court by Donahue, J. Just before petitioners were able to present their motions, however, a stay of the proceeding was ordered by the Honorable William J. Brennan, Jr., Associate Justice of the United States Supreme Court. Justice Donahue did announce, however, that he intended to resentence the petitioners and considered the October 9, 1981, hearing a nullity as per the decision of the Supreme Judicial Court.

12. At no time did Judge Abrams rescind his offer to allow the petitioners to withdraw their pleas of guilty.

13. The failure of the hearing judge to allow petitioners to withdraw their pleas of guilty deprived them of due process of law as guaranteed them by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article XII of the Massachusetts Declaration of Rights, because the offer of Judge Abrams to allow petitioners to withdraw their pleas and the acceptance of that offer by the petitioners constituted a binding obligation on the part of the Commonwealth, the breach of which denied petitioners their due process rights.

14. The petitioners have no other avenues of relief than this petition to the Supreme Judicial Court. The petitioners have sought stays of the proceedings in the state and federal courts and, except for a brief stay granted by the United States Supreme Court, have been unsuccessful in obtaining same. Petitioners intend to continue to pursue their double jeopardy claims and reserve their right to do so, but must simultaneously move to withdraw their guilty pleas to avoid the illegal resentencing procedure and further punishment.

Appendix K

15. The petitioners will suffer irreparable damage as a result of the hearing judge's failure to abide by the offer of Judge Abrams to allow the petitioners to withdraw their pleas of guilty. They face the likely prospect of a lengthy period of incarceration, whereas, if they were allowed to withdraw their pleas and stand trial, they would have a reasonable likelihood of success of not guilty verdicts. It is uncontraverted that the alleged victim in this matter went willingly with the petitioners to the place where the rape allegedly occurred; that she, in all probability, will refuse to testify at trial; and that the only eyewitness against the petitioners will be an alleged co-participant who has been granted immunity in exchange for his testimony.

WHEREFORE, the petitioners respectfully request that this Court:

a) Order that this matter be remanded to the Superior Court Department of the Trial Court, Norfolk Division, and that the petitioners be allowed to withdraw their pleas of guilty and stand trial upon Indictment Nos. 76300-03, 76308-11, and 76316-19, in accordance with the motion of Petitioner Savoy attached hereto and the reservations contained therein.

b) Order that petitioners be granted such other relief as this Court deems meet and just.

By their attorney
P. J. PISCITELLI

July 8, 1982

APPENDIX L

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS
SUPERIOR COURT DEPT.
NO.

COMMONWEALTH OF MASSACHUSETTS
VS.
MARK S. SAVOY

MOTION TO WITHDRAW GUILTY PLEA

Now comes the defendant, Mark S. Savoy, and moves this honorable Court to allow him to withdraw his plea of guilty entered on October 5, 1981.

As grounds therefor, the defendant states that on October 9, 1981, when Justice Abrams revoked the defendant's suspended sentence, he also offered defendant an opportunity to withdraw his guilty plea pursuant to Mass.R.Crim.P.12, as set forth in the attached copy of a transcript of the proceedings on October 9, 1981, in the Superior Court Department, Norfolk Division, and thus defendant should be allowed now to accept said offer and withdraw his plea.

The defendant further states that this motion to withdraw his guilty plea is made with a full reservation of his rights to proceed with any appropriate action in the federal courts concerning his claim that the re-sentencing proceeding would place him twice in jeopardy in violation of his rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States, and that such with-

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drawal of his guilty plea is made solely because he faces an unconstitutional re-sentencing proceeding and possible incarceration.

By his attorney,

July 1, 1982 P. J. PISCITELLI

APPENDIX La

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS
SUPERIOR COURT DEPARTMENT
Nos. 76300-303

COMMONWEALTH OF MASSACHUSETTS
VS.
ROBERT J. TARR

MOTION TO WITHDRAW GUILTY PLEA

Now comes the defendant, Robert J. Tarr, and moves this Honorable Court to allow him to withdraw his plea of guilty entered on October 5, 1981.

As grounds therefor, the defendant states that on October 9, 1981, when Justice Abrams revoked the defendant's suspended sentence, he also offered defendant an opportunity to withdraw his guilty plea pursuant to Mass.R.Crim.p.12, as set forth in the attached copy of a transcript of the proceedings on October 9, 1981, in the Superior Court Department, Norfolk Divison, and thus defendant should be allowed now to accept said offer and withdraw his plea.

The defendant further states that this motion to withdraw his guilty plea is made with a full reservation of his rights to proceed with any appropriate action in the federal courts concerning his claim that the re-sentencing proceeding would place him twice in jeopardy in violation of his rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States, and that such with-

drawal of his guilty plea is made solely because he faces an unconstitutional re-sentencing proceeding and possible incarceration.

By his attorney,

Joseph R. Welch
10 Diauto Drive
Randolph, MA 02368
Tel. 963-7071

July 12, 1982

APPENDIX M

The following states adhere to the rule that when a valid sentence has been put into execution (in whole or in part), the court cannot amend, modify or revise it in any way, and, any attempt to do so is of no effect and the original sentence remains in force.

ALASKA	*Huff* v. *State*, 568 P.2d 1014 (Alaska 1977)
ARIZONA	*Silver* v. *State*, 37 Ariz. 418, 295 P. 311 (1931)
ARKANSAS	*Fletcher* v. *State*, 198 Ark. 376, 128 S.W.2d 997 (1937) *Charles* v. *State*, 256 Ark. 690, 519 S.W.2d 68 (1974)
CALIFORNIA	*People* v. *Jordan*, 226 Cal.App.2d 7, 37 Cal.Rptr. 738 (1964) *People* v. *Clinton*, 243 Cal.App.2d 284, 56 Cal.Rptr. 221 (1966) *People* v. *Henold*, 16 Cal.App.3d 958, 94 Cal.Rptr. 538 (1971)
COLORADO	*Guerin* v. *Fullerton*, 154 Colo. 142, 389 P.2d 84 (1964) *Righi* v. *People*, 145 Colo. 457, 359 P.2d 656 (1961)
CONNECTICUT	*Kohlfuss* v. *Warden of Connecticut State Penitentiary*, 149 Conn. 692, 183 A.2d 626 (1962) *State* v. *Pallotti*, 119 Conn. 70, 174 A.2d 74 (1934)
FLORIDA	*Smith* v. *State*, 330 So.2d 59 (Fla.App. 1976) *Flowers* v. *State*, 351 So.2d 387 (Fla.App. 1977)
GEORGIA	*Inman* v. *State*, 124 Ga.App. 190, 183 S.E.2d 413 (1971)
HAWAII	*In Re Dizon*, 26 Haw. 363 (1922)
IDAHO	*State* v. *Ensign*, 38 Idaho 539, 223, P. 230 (1924)

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ILLINOIS	*People* v. *Wakeland*, 15 Ill.2d 265, 154, N.E.2d 245 (1958)
KANSAS	*State* v. *Carte*, 157 Kan. 139, 138 P.2d 429 (1943), *aff'd*, 143 P.2d 794 (1943)
LOUISIANA	*State* v. *Woods*, 154 La. 631, 98 So. 47 (1943)
MAINE	*Brown* v. *Rice*, 57 Me. 55, 2 Am.Rep. 11 (1869)
MARYLAND	*Hohensee* v. *State*, 400 A.2d 455 (Md.App. 1979)
MICHIGAN	*Re Richards*, 150 Mich. 421, 114 N.W. 348 (1907)
MINNESOTA	*State ex rel Bennett* v. *Rigg*, 257 Minn. 406, 102 N.W.2d 17 (1960)
MISSOURI	*Hulett* v. *State*, 468 S.W.2d 636 (Mo. 1971) *Ex parte Morgan*, 280 S.W. 1038 (Mo. 1926)
MONTANA	*State* v. *Downing*, 593 P.2d 43 (Mont. 1979)
NEBRASKA	*Myers* v. *Fenton*, 121 Neb. 56, 236 N.W. 143 (1931)
NEW JERSEY	*State* v. *Pratts*, 145 N.J.Super. 79, 366 A.2d 1327 (1975)
NEW YORK	*People* v. *manasek*, 35 Misc.2d 228, 229 N.Y.S.2d 295 (1962) *People* v. *Boyd*, 51 Misc.2d 550, 773 N.Y.S.2d 491 (1966)
NEW MEXICO	*State* v. *Verdugo*, 79 N.M. 765, 449 P.2d 781 (1969)
NORTH DAKOTA	*Ex Parte Moore*, 71 N.D. 274, 300 N.W. 37 (1941)
OKLAHOMA	*Re Gable*, 73 Okla.Crim.Rep. 155, 118 P.2d 1035 (1941)
PENNSYLVANIA	*Commonwealth* v. *Garner*, 204 Pa.Super. 227, 203 A.2d 333 (1964) *Commonwealth* v. *Brown*, _____ Pa. Super. _____, 314 A.2d 506 (1974)

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TEXAS	*Turner* v. *State*, 116 Tex. Crim.Rep. 59, 32 S.W.2d 658 (1930)
UTAH	*Crease* v. *Pleasant Grove City*, 30 Utah2d 451, 519 P.2d 888 (1974)
VERMONT	*State* v. *Harbaugh*, 132 Vt. 569, 326, A.2d 821 (1974)
WASHINGTON	*Ex Parte Lucas*, 26 Wash.2d 289, 173 P.2d 774 (1946)
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Office - Supreme Court, U.S.
FILED
SEP 1 1982
ALEXANDER L. STEVAS,
CLERK

NOS. 82-203, 82-5159

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 82-203

MARK S. SAVOY
and
ROBERT J. TARR,
Petitioners

V.

COMMONWEALTH OF MASSACHUSETTS
Respondent

NO. 82-5159

ALEXANDER ALDOUPOLIS,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

BRIEF FOR RESPONDENT, COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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OPINIONS BELOW

Respondent is not dissatisfied with petitioners' citation to opinions below.

JURISDICTION

Petitioners' claim jurisdiction under 28 U.S.C. §1257(3). Respondent will question the jurisdiction of the Court.

STATEMENT OF THE CASE[1]

On October 5, 1981, the petitioners and their co-defendants offered a plea of guilty to charges of rape, unnatural rape and malicious destruction of property. In the course of examining each defendant as to the voluntariness and competency of the plea, the Court inquired of the assistant district attorney whether there was "an agreement made contingent upon the defendant's offer to change his plea ...?" The

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1/ The Statement of the Case is based in part upon the consolidated Record Appendix submitted to the Supreme Judicial Court.

reply was in the negative, without challenge by counsel for the defendants Consolidated R.A. 108; Tr. 11, 24, 30, 38, 44). The prosecution added that its recommendation for all defendants was an M.C.I. Concord commitment of ten years. (Consolidated R.A. 118, 129, 138, 145; Tr. 11, 22, 31, 38). The Court then proceeded to instruct the defendants that it was not restricted by the sentence recommendation, that any sentence provided by law could be imposed and that the maximum penalty for rape under c. 265, section 22, is a state prison sentence for life or any term of years. (Consolidated R.A. 119, 132, 146; Tr. 12-13, 25, 32, 39). The defendants denied that any threats or promises had been made which induced them to change their plea, (Consolidated R.A. 119; 134, 139, 145: Tr. 12, 27, 31,

38, 41), and acknowledged that they were pleading guilty because they were guilty "and for no other reason." Consolidated R.A. 129, 135, 142, 149; Tr. 22, 28, 35, 42).

After hearing argument of defense counsel, the Court adopted defense counsel's request for suspended Walpole sentences of three to five years, with two years of supervisory probation (Consolidated R.A. 169; Tr. 62), and imposed as a condition of probation that defendants Tarr and Savoy obtain a G.E.D. degree during the two years of probation. (Consolidated R.A. 171; Tr. 63). The Court further imposed court costs of five hundred dollars a week for a hundred weeks commencing on October 8, 1981. On October 8, 1981, counsel for each defendant was ordered to appear before the court at 10 a.m. on October

9, 1981. (Consolidated R.A. 170, 173-180; Tr. 63, 66-73).

On October 9, 1981, the court reconvened and with defendants and counsel present, revoked the suspension of the execution of the sentences imposed on October 5, 1981 and in accordance with Mass. R. Cr. P. 12C, 2(b) gave leave to the defendants to move to withdraw their pleas of guilty. (Consolidated R.A. 186; Tr. October 9, 1981, 5).

In revoking the suspension of the execution of the three to five year Walpole state prison sentence, the Court noted that it felt that the original sentence was "an appropriate disposition under the facts and circumstances then presented to me in a lobby conference." (Consolidated R.A. 183; Tr. 2). The Court continued, "occasions inevitably

will occur where a Judge, upon receipt of other information, will feel that due weight to all factors was not taken into account on the imposition of sentencing, such as the situation presented here as regards to the suspension of the sentence imposed ..." (Consolidated R.A. 185; Tr. 4). The Court, in addition, noted the questionable validity of imposition of a suspended sentence under Gen. Laws C. 279, §§1 and 1A. (Consolidated R.A. 186; Tr. 5).

The court then issued the following order:

> It is ordered that the suspension of the execution of the sentences imposed in the above-entitled matters on October 5, 1981 is hereby revoked. (Mass. R. Crim. P. 29). The defendants shall stand committed in execution of these sentences for a term of not less than three years nor more than five years, at hard labor at our Massachusetts

> Correctional Institution, Walpole. The Court stays execution of these sentences pending further order of this court or an Appellate Court. Pursuant to the provision of the Mass. R. Crim. P. 12(c)(2)(b). The defendants are granted leave to withdraw their pleas of guilty and stand for a trial on the merits during the February criminal session. The defendants are released on their own personal recognizance pending further order of this Court. Action otherwise disposing of related companion cases is vacated those matters are returned to the trial list."

(Consolidated R.A. 190).

Shortly before October 9, 1981, certain defendants signed probation contracts and made the first payment of court costs. (Consolidated R.A. 190).a

Thereafter, defendants filed in the Single Justice Session of the Supreme Judicial Court motions to enjoin, to intervene and ultimately petitions for relief under Mass. Gen. Laws c. 211, §3. The Attorney General filed a Motion

to Intervene on behalf of the Trial Court of the Commonwealth which was unopposed and a Motion to Dismiss. The Single Justice reserved and reported three questions to the Full Bench of the Supreme Judicial Court.[2/]

2/ (1) Whether G.L. c. 279, §1, prohibits the suspension of the execution of a sentence of an offense punishable by life imprisonment or for any lesser term of years; (2) whether the trial judge was authorized under Mass. R. Crim. P. 29 to convert the suspended sentence to a sentence of imprisonment without violating the Double Jeopardy Clause of the United States Constitution; and (3) whether, if the answer to issue (2) is in the affirmative, the judge can take the action described on less than twenty-four hours' notice to the defendants, without any prior notification of the purpose the hearing, and without the defendants' having an opportunity to be heard at the hearing. Aldoupolis v. Commonwealth, 435 N.E.2d 330 (1982).

The Court held that the trial court's original suspension of the execution of sentence was not forbidden by G.L. c. 279, §1. However, the court further held that the constitutional prohibition against double jeopardy did not preclude the trial court's revision and revocation of the sentence pursuant to Mass. R. Crim. P. 29 within 60 days after imposition of that sentence "if it appears that justice may not have been done." The court further held that the defendants were given neither notice nor opportunity to be heard at the hearing wherein suspension of execution of sentence was revised and revoked, and therefore ordered "[t]he sentences are to be vacated and the defendants are to be resentenced in a manner consistent with this opinion." Aldoupolis v. Commonwealth, Mass. 435 N.E.2d 330, 386

Mass. 260 (1982). A petition for rehearing was denied on June 3, 1982.

Petitioners then sought an injunction in the federal district court to prevent a hearing on re-sentencing scheduled for July 1, 1982. On June 30, 1982, the motion for preliminary injunction was denied, after hearing.

The petitioners then applied to the Court of Appeals for the First Circuit for a stay of the District Court Order pending appeal. The Court of Appeals, without hearing, denied the stay. During these federal proceedings, petitioner also sought, ex parte, stay of the re-sentencing proceedings in the Supreme Judicial Court. The stay was denied.

On July 6, 1982, this Court (Brennan, J.) denied without prejudice petitioners' application for a stay of

the resentencing proceedings.

On July 12, 1982, petitioners Savoy and Tarr petitioned the single justice of the Supreme Judicial Court for an order allowing them to withdraw their guilty pleas. Said petition was denied.

At the resentencing hearing on July 15, 1982 the petitioners filed motions to withdraw their guilty pleas. Said motions were allowed and a trial date set for December.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. §1257(3)

A. The Federal Claim Presented To This Court Was Neither Presented Nor Ruled Upon By The Supreme Judicial Court.

Petitioners Savoy and Tarr present the following question to this Court:

> "Whether the petitioners' Fifth and Fourteenth Amendment rights not to be placed twice in

> jeopardy will be violated by their trial on charges to which they have already pled guilty, been sentenced, and commenced execution of said sentences". Petition No. 82-203.[3]

Petitioner Aldoupolis frames the question as follows:

> "Is it a violation of petitioners' Fifth and Fourteenth Amendment Right not to be placed in double jeopardy to be resentenced or retried when petitioner has already pleaded guilty and commenced serving a legally imposed sentence with every expectation that it was a final disposition?" Petition of Aldoupolis, No. 82-5159, I.

The relevant question presented to and decided by the Supreme Judicial Court was whether the trial judge, on his own motion could vacate a suspended sentence and impose a jail sentence under Mass. R. Crim. P. 29. See, Petition of Savoy,

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3/ Respondent does not concede that partial payment of court costs as a condition of probation constitutes commencement of execution of sentence.

App. A, 4a; App. H. 49a.

Thus, the case before the Supreme Judicial Court involved an interpretation of a Massachusetts rule of criminal procedure, clearly a question of state law only, and ultimately the federal issue of whether such revision of sentence or resentencing would violate the constitutional prohibition against double jeopardy. The Court ruled that it would not, if done with full due process procedural protections, and sent the case back to the trial court for resentencing. However, the petitioners were never resentenced. They withdrew their pleas of guilty and are now set for trial. The only live controversy is whether they can be tried, given the initial acceptance (and later withdrawal) of their pleas.

This issue was never presented to nor ruled upon by the Supreme Judicial Court. Therefore, the writ should not be granted. Newsom v. Smyth, 365 U.S. 604, 605 (1961) (writ of certiorari dismissed as improvidently granted where record did not establish that the state court "found or was required to find that there was presented to it the federal claim on which the case was brought here").

B. The Judgment Below Is Not A Final Judgment Under 28 U.S.C. §1257(3).

The Court below held that petitioners' sentence could be revised but that they had not been afforded notice and an opportunity to be heard. The Court therefore vacated the sentences and remanded the case to the trial court for resentencing. The

petitioners withdrew their pleas and a future trial date was set. The jurisdictional requirement of finality is not present in the instant case. The final judgment in a criminal proceeding is the sentence. Berman v. United States, 302 U.S. 211 (1937); Parr v. United States, 351 U.S. 513, 518 (1956).

Abney v. United States, 431 U.S. 651, 652-662 (1977) does not constitute an exception to the finality rule applicable to the instant case. In Abney this Court held that a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds fell within the "collateral order" exception to the final judgment rule announced in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). Here, however, petitioners have not moved to

dismiss the indictments on double jeopardy grounds - no court in the Commonwealth has ruled on such a motion. The only issue decided was whether a judge could revise a sentence under Mass. R. Crim. P. 29. There is now no live question concerning resentencing on the guilty pleas as the pleas have been withdrawn. There is not only no final judgment, there is no judgment at all pertaining to a live controversy.

C. Petitioners' Request For Review Is Merely A Request For An Advisory Opinion

In so far as petitioners' request of the Supreme Judicial Court's decision on petitioners' sentences imposed after their pleas of guilty, any relief ordered by the Court would not apply to them, despite petitioners' protestations they did in fact move to withdraw

their pleas of guilty. The motions were allowed. Thus, they have removed the necessary, underlying, foundation for imposition of a sentence based upon a plea. Petitioners have, in effect, extinguished their claim that the double jeopardy clause precludes re-sentencing upon their pleas of guilty. Any decision on that issue would be advisory only. This court does not give such opinions. Federal Radio Comm. v. General Electric Co., 281 U.S. 464 (1930); Mutual Life Ins. Co. v. Snyder, 93 U.S. 393 (1876).

II. REVOCATION OF THE SUSPENSION OF EXECUTION OF SENTENCE DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

A. Rule 29, Mass. R. Crim. P. Provides For Revocation Of Sentence.

Rule 29 Mass. R. Crim. P. is explicit in granting to a trial judge

the power to revise and revoke, within sixty days of imposition, a sentence "if it appears that justice may not have been done." The clear meaning of the words of the Rule and dictum in Commonwealth v. Sitko, 372 Mass. 305, 314 (1977) indicate that a judge may revise upon his own motion, and revise upward under certain circumstances without violation of double jeopardy prohibitions.

Moreover, Rule 29, is drawn in part from Fed. R. Crim. P. 35 which provides, in part, "[t]the court may correct any illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Federal case law indicates that not only may the court correct an illegal sentence, it has a duty to do so. "When a sentencing

court discovers that a sentence imposed by it did not conform to the applicable penalty statute, it has the duty to correct the sentence so as to comply with the statute even though service of the sentence first imposed has begun, and through the corrected sentence is required to be more onerous." Llerana v. United States, 508 F.2d 78 (1975). See also, United States v. Romero, 642 F.2d 392 (10 Cir. 1981). Garcia v. United States, 492 F.2d 395 (10th Cir. 1974), cert. denied, 419 U.S. 897.

While the federal rule is limited to revision where the original sentence is illegal, while in this case it was not, the crucial factor to be elicited from the cases cited above is that neither commencement of service of the sentence, nor its increase operates to implicate the prohibition against double

jeopardy. In any event construction of Rule 29 is a matter of state law as is the Court's finding that no expectation of finality was warranted in light of that rule.

B. The Trial Court Did Not Increase The Sentence.

The trial court imposed a 3-5 year sentence, and then suspended its execution. This sentence is legal, falling within the perimeters of the punishment described by statute. When the court revoked the suspension, it removed the underlying necessary condition for probation once a sentence has been imposed, but it did not increase the terms of the previously imposed sentence.

United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977) is totally inapposite. In Bynoe the court suspended imposition

of sentence and placed the defendant on probation for one month. A week later the court vacated the order suspending imposition of sentence and imposed a fine, thereby increasing the penalty from one month probation to a $2,500 fine. Here, the court initially imposed a 3-5 year sentence, it made no attempt to increase it. Nothing in Bynoe indicates that this action is impermissible. If the court were to hold that revocation of suspension of execution of a sentence is an increase in sentence, it would logically follow that every revocation of probation and imposition of a previously imposed sentence would result in an increase in sentence constituting multiple punishment for double jeopardy consideration. There is no law to that effect. Here the court made no attempt

to increase the terms of the sentence, it merely altered the conditions under which that sentence must be served.

C. Double Jeopardy Principles Do Not Necessarily Prohibit A Change In A Sentence.

The constitutional protections afforded by the guarantee against double jeopardy are threefold:

> "It protects against a second prosecution for the same offense after acquittal. It protects against the second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

The protection is unequivocal where an acquittal on the facts has been reached. United States v. Ball, 163 U.S. 662 (1896). The rule is absolute because a jury verdict of acquittal is a final judgment (Arizona v. Washington, 434 U.S. 503 (1978) and accorded absolute finality. Burks v. United States, 437 U.S. 1, 16 (1978). See also, Bullington v. Missouri, 451 U.S. 430 (1981).

However, the protection is not absolute where an acquittal is not obtained. Retrial following reversal of a conviction is not barred by double jeopardy principles. United States v. Tateo, 377 U.S. 463 (1964),[4/]

4/ The exception is if reversal is based on insufficiency of evidence. Burks v. United States, supra.

nor is retrial barred after declaration of a mistrial under proper considerations. Arizona v. Washington, 434 U.S. 497, (1981).

This Court has, historically, never viewed sentencing determinations as possessing the same finality as acquittal. See Stroud v. United States, 251 U.S. 15 (1919).

The key to the application of the double jeopardy prohibition, it is submitted, is the finality which in a constitutional sense attends the prior disposition. Here, the disposition prior to revocation carried with it little finality. Execution of a 3-5 year sentence was suspended and probation imposed.

Probation involves only a "conditional liberty" Gagnon v. Scarpelli, 411 U.S. 788, 781 (1973)

(citing Morrissey v. Brewer, 408 U.S. 471 (1972). The lack of finality involved where the disposition is suspension of execution of sentence and probation is graphically illustrated in Commonwealth v. Sawicki, 369 Mass. 377 (1975). In Sawicki, the defendant was sentenced to one year imprisonment, sentence suspended, probation for one year. The stated term of probation ended on September 4, 1974. On March 13, 1975, the probation was ordered extended for two years.

The Supreme Judicial Court held that a judge had the power to extend the term of probation by an order entered after the original probationary term has expired. As with a case placed on file, execution of sentence may be brought forward at any appropriate time.

The ruling of this Court in United States v. DiFrancesco, 449 U.S. 117, (1980) holding that double jeopardy does not prohibit an increase in a validly imposed and executed sentence on a government appeal is controlling. Focusing upon the finality aspect, the court concluded that "a criminal sentence, once pronounced" was not "to be accorded constitutional finality and conclusiveness similar to that which attaches a jury verdict of acquittal." DiFrancesco at 435. Reaching this conclusion, the court upheld (in the fact of an attack based upon the constitutional prohibition against multiple punishments), a statute which permitted increase of sentence on the government's appeal.

In the instant case there can be no argument that the revised sentence is

greater than that authorized by the legislature, nor that the defendants have fully satisfied the original disposition.

Any possible constitutional basis for the proposition that the minimal compliance by defendants with the original disposition in this case precludes alteration of the conditions of their sentence is cast in substantial doubt by the facts in DiFrancesco itself. Reference to the Court of Appeals decision in that case reveals that DiFrancesco immediately began service of the sentence appealed by the government. United States v. DiFrancesco, 604 F.2d 769, 782 n.18 (2nd Cir. (1979). The rule in this Commonwealth has long been that a sentence could be corrected at any time during the same term of court.

Commonwealth v. Weymouth, 85 Mass. 92 Allen 114 (1961). Therefore, it would appear that there is no per se constitutional prohibition against revising a sentence and that mere commencement of service is irrelevant for double jeopardy purposes.

Since neither history nor policy underlying the Double Jeopardy Clause suggests that its purpose was to protect or enhance the finality of sentences, it is suggested that Massachusetts properly follows the practice of the federal courts in permitting resentencing and imposition of harsher conditions, as well as increased sentences.

In United States v. Busic, 639 F.2d 940 (3rd Cir. 1981), the Third Circuit applying DiFrancesco overruled prior decision holding that double jeopardy jurisprudence prohibited on remand for

resentencing, imposition of a harsher sentence than that initially imposed, and held that double jeopardy does not bar resentencing following appeal even on counts that were not set aside on appeal.

It is submitted that applying the rule and reasoning of DiFrancesco, the revocation of suspension of execution of sentence and imposition of the originally declared sentence, with the option to withdraw the pleas, does not offend double jeopardy principles. This conclusion obtains where revocation was made upon receipt of other information and the court felt that due weight to all factors had not been taken into account, as the trial judge indicated at the revocation hearing. (Consolidated R.A. 185).

Therefore, it is submitted that,

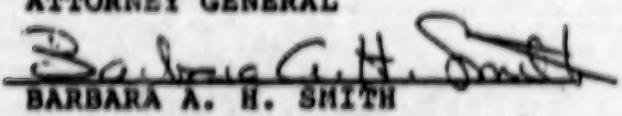
even though the issue is not properly before the Court, the constitutional prohibition against double jeopardy was not offended, and in any event the petitioners have "wiped the slate clean" by withdrawing their pleas of guilty.[5/]

CONCLUSION

For the reasons stated above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BY: 

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5/ Mass. R. Crim. P. 12 (f) makes evidence of a withdrawn guilty plea inadmissible in any subsequent criminal or civil proceeding.